

1 BEFORE THE
2 ILLINOIS COMMERCE COMMISSION
3
4 IN THE MATTER OF:)
5 XO ILLINOIS, INC.,)
6) No. 01 -0466
7 Petition for Arbitration pursuant)
8 to Section 252(b) of the)
9 Telecommunications act of 1996 to)
10 establish an interconnection)
11 agreement with Illinois Bell)
12 Telephone Company.)
13
14 Chicago, Illinois
15 August 22, 2001
16
17 Met, pursuant to notice, at 10:00 a.m.
18
19 BEFORE:
20
21 MR. DAVID GILBERT, Administrative Law Judge
22
23 APPEARANCES:
24
25 MAYER, BROWN & PLATT, by
26 MR. DENNIS FRIEDMAN
27 190 South LaSalle Street
28 Chicago, Illinois 60603
29 ---and---
30 MS. NANCY HERTEL
31 225 West Randolph
32 Suite 25-D
33 Chicago, Illinois 60606
34 appearing for Ameritech;

1
2 APPEARANCES (Cont'd)
3 ROWLAND AND MOORE, by
4 MR. THOMAS ROWLAND and MR. STEPHEN MOORE
5 77 West Wacker Drive
6 Suite 4600
7 Chicago, Illinois 60601
8 appearing for XO Illinois;
9
10
11
12
13
14
15
16
17
18
19
20
21 MS. MARY STEPHENSON, MS. MARGARET KELLY, and
22 MR. DAVID NIXON
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
appearing for ICC staff.

21 SULLIVAN REPORTING COMPANY, by
Jennifer L. Velasco, CSR
22 License No. 084-004030

1		I N D E X				
2	Witnesses:	Direct	Cross	Re - direct	Re- cross	By Judge
3	Douglas Kinkoph	22	42 70	74 88	80	71 85
4	Eric Panfill	90	92 124	138	147	128
5						
6	James Zolnierrek	152	162 187	212	214 208	192
7						
8		E X H I B I T S				
9						
10	Number Evidence	For Identification			In	
11	XO					
12	Nos. 1, 2, 3		20			41
13	Ameritech Illinois Nos. 1, 2, 3		70			91
14	Staff					
15	Nos. 1.0P, 1.0A-P, 1.0B-P, 1.0C-P		138			---
16						
17						
18						
19						
20						
21						
22						

1 (Whereupon, XO
2 Exhibit Nos. 1, 2, 3 were
3 marked for identification.)

4 JUDGE GILBERT: Pursuant to the authority of the
5 Illinois Commerce Commission, I now call Docket No.
6 01-0466.

7 If I could have appearances for the
8 record, please, beginning with the petitioner.

9 MR. MOORE: On behalf of XO Illinois, Inc.,
10 Stephen J. Moore and Thomas H. Rowland, Rowland and
11 Moore, 77 West Wacker, Suite 4600, Chicago,
12 Illinois 60601.

13 MR. FRIEDMAN: On behalf of Ameritech Illinois,
14 Dennis Friedman, Mayer, Brown, and Platt, 190 South
15 LaSalle Street, Chicago, Illinois 60603.

16 MS. HERTEL: Appearing on behalf of Ameritech
17 Illinois, Nancy Hertel, 225 West Randolph, 25 -D,
18 Chicago 60606.

19 MS. KELLY: On behalf of the staff of the
20 Illinois Commerce Commission, Margaret Kelly, Mary
21 Stephenson, and David Nixon, 160 North LaSalle,
22 Suite C-800, Chicago 60601.

1 JUDGE GILBERT: Okay. Just as a couple
2 housekeeping things that we noted prior to going on
3 the record, there is a piece of proprietary
4 testimony, and that is from staff witness
5 Zolnierrek. And it's my understanding that the
6 proprietary designation will be retained throughout
7 the course of the proceeding.

8 Ms. Hertel, you've indicated that a
9 proprietary agreement has not been signed but will
10 be and --

11 MS. HERTEL: Yes, they have indicated they are
12 willing to sign it. It will be in the standard
13 form that we've used in other dockets.

14 JUDGE GILBERT: You're comfortable proceeding
15 without that agreement signed at this time?

16 MS. HERTEL: Yes, I am, upon the representation
17 that they will sign it and that they've been
18 holding those materials as proprietary.

19 MR. ROWLAND: We will sign the agreement.

20 JUDGE GILBERT: Why don't we start with
21 petitioner's case.

22 MR. MOORE: At this time I'd like to call

1 Mr. Douglas W. Kinkoph, K-i-n-k-o-p-h.

2 (Witness sworn.)

3 DOUGLAS W. KINKOPH,

4 called as a witness herein, having been first duly

5 sworn, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY

8 MR. MOORE:

9 Q. Could you please state your name.

10 A. Douglas William Kinkoph.

11 Q. Who are you employed by?

12 A. XO Communications, Inc.

13 Q. What is your position there?

14 A. Vice president of regulatory affairs.

15 Q. I show you what has been marked for

16 identification as XO Exhibit 1 entitled the

17 verified statement of Douglas W. Kinkoph consisting

18 of seven pages of questions and answers.

19 Did you prepare this testimony, or was

20 it prepared under your direction?

21 A. Yes, I did.

22 Q. And if you were asked the same questions

1 today contained in this, would you give the same
2 answers?

3 A. Yes.

4 Q. I now show you what has been marked for
5 identification as XO Exhibit 2 entitled verified
6 statement of Douglas W. Kinkoph, reply to the
7 testimony of James Zolnierrek, consisting of eight
8 pages of question and answer -- off the record.

9 (Discussion off the record.)

10 MR. MOORE: Can I take that back. Let's start
11 again.

12 Q. I show you what has been marked for
13 identification as XO Exhibit 2 entitled verified
14 reply testimony of Douglas W. Kinkoph consisting of
15 ten pages of question and answers and Exhibit A to
16 that testimony.

17 Was this testimony prepared by you or
18 under your direction?

19 A. Yes, it was.

20 Q. And if asked the same questions today,
21 would you give the same answers?

22 A. Yes.

1 Q. I now show you what has been marked for
2 identification as XO Exhibit 3 entitled verified
3 statement of Douglas W. Kinkoph, reply to the
4 testimony of James Zolnierrek, consisting of eight
5 pages of question and answers.

6 Did you prepare this testimony, or was
7 it prepared under your direction?

8 A. Yes, it was.

9 Q. And if asked the same questions today,
10 would you give the same answers?

11 A. Yes.

12 MR. MOORE: Mr. Examiner, I would represent that
13 the versions submitted to the clerk -- to the
14 reporter today are identical to the ones that have
15 been submitted to the clerk's office on the filing
16 dates that they were required.

17 JUDGE GILBERT: All right.

18 MR. MOORE: At this time, I offer into the
19 record XO Exhibits 1, 2, and 3.

20 JUDGE GILBERT: Is there objection to the
21 admission of any or all of those exhibits?

22 MR. FRIEDMAN: Ameritech Illinois does have an

1 objection to the admission of one portion of XO
2 Exhibit 3. It is the portion, it starts at Page 4,
3 line 16, and continues through Page 5, line 11.

4 In this passage, Mr. Kinkoph discusses
5 the proposal of staff witness Zolnierrek that the
6 Commission direct Ameritech Illinois to declare
7 immediately whether or not it is going to opt in to
8 the FCC's rate caps.

9 When staff offers Dr. Zolnierrek's
10 testimony, we will object to it to the extent of
11 that proposal, and so we now since Mr. Kinkoph is
12 up first, object to his testimony on that subject.

13 There are three grounds for the
14 objection. The first is that staff's proposal that
15 the Commission direct Ameritech Illinois to make
16 its election is not within the scope of this
17 particular arbitration. The law is clear that in
18 an arbitration under Section 252(b) of the '96 Act,
19 the Commission must limit its consideration to the
20 issues set forth in the petition and the response.

21 That section 252(b)(4)(a) of the '96 Act
22 says that the state commission shall limit

1 mandatory its consideration of any petition to the
2 issues set forth in the petition and in response.

3 And this Commission routinely in its
4 arbitration decisions says on the very first page
5 that in keeping with that, the Commission shall
6 indeed limit its consideration to the issues set
7 forth in the petition and response.

8 Now, in this instance, XO's petition did
9 not set forth any issue having to do with whether
10 Ameritech Illinois should or should not be required
11 to make a selection with the respect to the FCC's
12 rate caps, and certainly Ameritech Illinois sets
13 forth no such issue in its response.

14 Now, to be sure, after Dr. Zolnierrek
15 made his proposal, XO, through the testimony of
16 Mr. Kinkoph, jumped on his proposal. But staff is
17 not entitled under the 1996 Act to, if you will,
18 set forth new questions for the Commission to
19 address beyond the issues set forth in the petition
20 and the response.

21 I would also add, although this is
22 really in parentheses, that the resolution of the

1 issues that the parties have set forth does not
2 call for the Commission to address Dr. Zolnierrek's
3 proposal. That is to say, XO has its views, we,
4 Ameritech Illinois, have our views; each of them
5 our proposed ways of resolving the issues, and none
6 of those entail addressing the question presented
7 by Dr. Zolnierrek. So that's the first ground.

8 The second ground is that even if, for
9 example, XO's petition had asked the Commission to
10 order Ameritech to make its election so that the
11 issue was teed up, if you will, in the petition
12 under Section 252(b), the Commission still would
13 have no authority to do so.

14 When the Commission is acting as an
15 arbitrator under Section 252(b), as it is here, the
16 Commission does not have the full panoply of
17 authority that it may have in other context.

18 What the Commission is authorized to do
19 is that which Congress has indicated it is
20 authorized to do in Section 252, and that is to
21 resolve disagreements between the parties that have
22 to do with the parties' substantive rights under

1 Section 251 of the Act.

2 Section 251 requires us to do a bunch of
3 things for XO; interconnection, resale, access to
4 unbundled network elements and so forth.

5 And Section 252 is clear that in an
6 arbitration, the task is to resolve differences of
7 opinion about the rights and obligations
8 established in Section 251.

9 Now, this question of whether Ameritech
10 should be required to declare itself, that is, to
11 declare whether it's going to do the FCC rate caps,
12 is the farthest thing in the world from a question
13 about the party's rights or duties under Section
14 251.

15 As a matter of fact, when the FCC
16 established those rate caps, it was acting under
17 its authority under Section 201 of the
18 Telecommunications Act. In fact, the whole point
19 of the thing is that intercarrier compensation or
20 ISP-bound traffic is not governed by Section 251.
21 So the FCC set up this regime to deal with this
22 interstate traffic under its Section 201 authority.

1 So that's the second reason that
2 Dr. Zolnierrek's proposal can't be considered; is
3 that even if the question is properly teed up, it's
4 not a proper subject for arbitration under Section
5 252.

6 The third reason I will just mention in
7 passing, and that is that even apart from that,
8 even if this were some other sort of proceeding,
9 even if, let's say, staff had initiated a docket to
10 determine whether Ameritech should be required to
11 declare itself and the Commission had the full
12 panoply of powers that it has by statute, it still
13 would not be lawful for the Commission to order
14 Ameritech to declare itself because the FCC's order
15 makes very clear that the incumbent local exchange
16 carrier gets to do that at its option when it so
17 chooses and subject, of course, to the conditions
18 set forth in the order.

19 So for all of those reasons, the
20 Commission cannot consider Dr. Zolnierrek's
21 proposal. It's not properly part of this
22 proceeding, and on that ground we move at this

1 time -- we object at this time to Mr. Kinkoph's
2 testimony on the subject.

3 JUDGE GILBERT: All right. The essence of your
4 objection is really to Dr. Zolnierrek's testimony?

5 MR. FRIEDMAN: To that piece, correct.

6 JUDGE GILBERT: In view of that, I want to let
7 staff respond to your objection as well as XO
8 because ultimately a ruling on Mr. Kinkoph's
9 response to Dr. Zolnierrek will determine whether
10 Dr. Zolnierrek's testimony remains in the record as
11 well.

12 In terms of who goes first, I don't
13 care. You guys ready to talk?

14 MR. MOORE: I can talk.

15 MS. STEPHENSON: Could I, just for
16 clarification, you're objecting to Mr. Zolnierrek's
17 testimony, page -- not to the entire thing. Just
18 for clarification, through Page 2, line 45 through
19 Page 3, line 51; Page 16, line 326 through Page 18,
20 line 360. I just want clarification that that's
21 part of Dr. Zolnierrek's testimony you're objecting
22 to.

1 MR. FRIEDMAN: I'll double-check that now.
2 That's certainly what I have on the piece of paper.
3 I thought it was right. It's the testimony about
4 that proposal.

5 JUDGE GILBERT: Mr. Friedman, while you were
6 discussing your supporting arguments, Ms. Hertel
7 circulated -- I shouldn't say circulated. She gave
8 me a piece of paper which essentially summarized
9 those arguments --

10 MR. FRIEDMAN: I apologize. I should have said
11 something about that. I asked --

12 JUDGE GILBERT: There's no need to apologize.
13 Let me finish what I was going to ask you about.
14 Was a copy of this also given to staff
15 counsel?

16 MS. HERTEL: I handed it to everyone in the
17 room.

18 JUDGE GILBERT: So it was distributed. That's
19 all I need to know.

20 So it's, as I understand it, Ameritech's
21 argument and the portion of each of the testimonies
22 they're addressing is set forth on this piece of

1 paper; is that right?

2 MR. FRIEDMAN: The summary of the argument, yes.

3 JUDGE GILBERT: No, no --

4 MR. FRIEDMAN: I'm sorry. The passages, yes.

5 JUDGE GILBERT: The page reference and line
6 references are there?

7 MR. FRIEDMAN: Right.

8 JUDGE GILBERT: Okay. Do you have a similar
9 sheet that you were going to distribute had
10 Dr. Zolnierrek gone first?

11 MR. FRIEDMAN: No.

12 JUDGE GILBERT: Okay.

13 MR. FRIEDMAN: Yes, to answer, Mary, your
14 question, I have double-checked now, and the page
15 and line numbers on that piece of paper are, in
16 fact, the portions of Dr. Zolnierrek's testimony to
17 which we would object. And if something doesn't
18 seem to sync up right, please let me know.

19 MS. STEPHENSON: I'm trying to compare it. I
20 know we gave out the revised testimony. I just
21 want to make sure it all coincides with what we are
22 going to submit is Mr. Zolnierrek's revised

1 testimony. So I just want to make sure we're all
2 on the same page when we admit everything into the
3 record.

4 JUDGE GILBERT: Well, the substance of the
5 objection, I assume, would remain the same because
6 I'm assuming the text of Mr. Zolnierrek's testimony
7 will remain the same unless there are grammatical
8 changes that were made.

9 MS. KELLY: There were grammatical changes.

10 MS. STEPHENSON: I just want to make sure we're
11 on the same page numbers, and I believe they are.

12 JUDGE GILBERT: Mr. Moore, I believe you were
13 ready to respond.

14 MR. MOORE: Very briefly. First of all, as to
15 the issue of whether this issue was teed up in the
16 petition, the petition paragraph 19 does refer to
17 the fact that pursuant to the FCC order Ameritech
18 must either accept that rate, that rate being the
19 FCC cap -- I'm sorry, the rate in the Focal
20 agreement or the rate set forth in the FCC order
21 including all traffic including traffic that does
22 not terminate with ISPs. So we did tee it up in

1 the sense of discussing the fact that Ameritech has
2 failed to opt in to the FCC's price caps.

3 As for the second allegation of whether
4 the Commission has authority, the Federal Act,
5 paragraph 252(a)(4)(c) which discusses the
6 Commission's obligations in any arbitration states
7 that these state commissions shall resolve each
8 issue set forth in the petition and the response,
9 if any, by imposing appropriate conditions as
10 required to implement subsection C upon the parties
11 to the agreement.

12 And subsection C sets forth the
13 standards for arbitration by the Commission which
14 includes ensuring that the resolution and
15 conditions meet the requirements of Section 251 and
16 various other activities.

17 So the Commission is obligated and has
18 the right to impose whatever conditions it thinks
19 are appropriate to meet the requirements of the
20 Federal Act.

21 The fact that Ameritech has decided not
22 to opt in to the FCC price caps is an important

1 issue in this case and has been addressed by all
2 the witnesses, and it's an issue that this
3 Commission should determine. And the staff remedy
4 that it proposes we believe is appropriate both as
5 a matter of public policy and is legal under the
6 Commission's authority under the Federal Act.

7 JUDGE GILBERT: Staff, you ready to respond?

8 MS. STEPHENSON: We would just concur with what
9 counsel just said. As counsel said, under
10 252(a)(4)(c), it does give the Commission the
11 authority to act upon the issues addressed in the
12 arbitrated agreement.

13 This issue is on the table. It is fully
14 within this docket. And Mr. Zolnierrek's testimony
15 does stick within those guidelines and it does
16 address issues specifically.

17 MR. FRIEDMAN: May I reply very briefly?

18 JUDGE GILBERT: Yes.

19 MR. FRIEDMAN: Mr. Moore begins by saying, Let's
20 look at paragraph 19 of the petition where we, XO,
21 make reference to the fact that Ameritech Illinois
22 has this election, okay, and he goes on to say that

1 tees up the issue. That's really the core of XO's
2 response to the petition and staff's as well.

3 It just isn't so. By that I mean the
4 following: Of course we all know that Ameritech
5 has that election. Of course we all know that
6 Ameritech may choose the FCC rate caps or may
7 choose not to take the FCC rate caps. And we also
8 know that that choice has all sorts of implications
9 and that this docket would have very different
10 shapes depending on whether Ameritech had made that
11 choice or not.

12 But the point is this: There is nothing
13 in the petition that in any way, shape, or form
14 complains about Ameritech not having made that
15 choice, certainly not paragraph 19. Nor is there
16 anything in the Commission that -- I'm sorry, in
17 the petition that comes anywhere close to asking
18 the Commission to order Ameritech to make that
19 choice.

20 The very first time anyone in this
21 docket was exposed to the -- in any way to the
22 concept even of the Commission ordering Ameritech

1 to make that election was when Dr. Zolnierrek
2 suggested it in his testimony.

3 So it just is not the case that the
4 petition tees up that issue. And since it doesn't
5 tee up that issue, the fact that Section
6 252(a)(4)(c) of the Federal Act authorizes the
7 Commission to decide the issues and in deciding
8 them to impose such conditions as it finds
9 appropriate to their decision just doesn't come
10 into play.

11 JUDGE GILBERT: I'm going to deny the motion and
12 for the time being allow Dr. Zolnierrek's
13 recommendation to remain in the record because I
14 think that it is conceivable that his
15 recommendation could be included within a remedy or
16 a resolution formulated under 252(a)(4)(c).

17 That said, I have to say that I was
18 concerned myself as I read his testimony,
19 Dr. Zolnierrek's testimony, that is, as to whether
20 he was asking the Commission to do something it had
21 the power to do.

22 And so by denying this motion I, by no

1 means, want to suggest that I think that the
2 Commission does have that power. In fact, I think
3 you have an uphill battle.

4 But for the time being, I want to allow
5 that to remain in the record. And I assume you
6 will renew your objection when Dr. Zolnierrek
7 testifies. You may want to do that merely to
8 preserve it for the record, which is fine with me.
9 I may at that time again allow it to remain in the
10 record, but I am very skeptical as to whether the
11 Commission has the power to do what that witness is
12 recommending.

13 MR. FRIEDMAN: May I ask, Judge, that perhaps
14 you take the motion with the case rather than
15 denying it. Taking it with the case allows for the
16 possibility of having it be in the record.

17 What I'm concerned is this: Eventually
18 we're going to have an order. I understand it's
19 always an uphill battle getting testimony stricken
20 in the moment because it disrupts the way things
21 are headed.

22 But the thought is that if the motion

1 turns out to be well-founded, it might make sense
2 for the Commission's order to reflect that and to
3 do so without having to go through a procedure
4 where the motion is denied and then we seek
5 rehearing or something. I'm just suggesting as an
6 administrative step it could possibly be
7 appropriate to just carry the motion with the case.

8 JUDGE GILBERT: I'm open to doing that.

9 Does anyone want to respond to that
10 particular point?

11 MR. MOORE: I guess just to the fact that it's
12 not unusual in arbitration hearings for the
13 Commission's order to result in the opening of
14 another docket to deal with an issue that was
15 raised in the arbitration that the Commission
16 decides on a generic matter.

17 For example, the Focal arbitration last
18 year resulted in Docket 00-0555 investigating ISP
19 compensation. So -- but if Mr. Zolnierrek is
20 silenced and the testimony is stricken from the
21 record, there's no basis for the Commission to take
22 a decision like that.

1 So I would hesitate to have this set up
2 to be stricken and, rather, I think it's
3 appropriate for the parties to brief it and
4 determine whether the Commission can take that kind
5 of an action in this case, in another case, or not
6 at all. And if it is stricken, then there's
7 nothing to discuss.

8 MR. FRIEDMAN: Actually, I don't disagree with
9 that. I was simply suggesting the motion could be
10 denied ultimately, the motion -- our objection in
11 the Commission's order.

12 I'm simply suggesting that we proceed
13 and the Commission can either grant or deny the
14 motion in its order. And it might choose to deny
15 the motion for the reasons you mentioned, although
16 I suppose staff probably is able to seek to
17 initiate a docket regardless. I don't think that's
18 a reason for not taking the motion with the case
19 and ruling on it in the arbitration decision.

20 MS. STEPHENSON: However, as we have found in
21 other cases, that tends to muddy the waters. And
22 we have gotten -- and I can cite numerous

1 arbitrations where it just -- it clouds the issues,
2 it goes on, and we don't have any resolution and
3 there's no definity, and we have had continual
4 problems by doing that.

5 MR. FRIEDMAN: I'm content to...

6 JUDGE GILBERT: Okay. I'll go this far then:
7 I'll take the motion through the end of testimony.
8 You can renew it at that point, all right.

9 So I'll withdraw the denial at this
10 point and hold it until I've heard all the
11 testimony. At that point I'll make a decision as
12 to whether to take it through the case or whether
13 to end it there, okay.

14 With that out of the way, are there any
15 other objections to Mr. Kinkoph's testimonies?

16 Okay. I will admit them subject to
17 cross-examination.

18 (Whereupon, XO
19 Exhibit Nos. 1, 2, 3 were
20 admitted into evidence.)

21 MR. MOORE: At this time I offer Mr. Kinkoph for
22 cross-examination.

1 JUDGE GILBERT: Mr. Friedman, I assume you're
2 going first.

3 CROSS-EXAMINATION

4 BY

5 MR. FRIEDMAN:

6 Q. Good morning again. How are you?

7 A. I'm fine.

8 Q. Could you get in front of you, please, the
9 interconnection agreement that XO wants, that is
10 the agreement that XO wants to come out of this
11 proceeding with?

12 A. I don't have the interconnection agreement
13 in my possession.

14 All right.

15 Q. Do you now have in your hand -- has your
16 attorney just handed you that which you recognize
17 as the interconnection agreement that XO is seeking
18 in this arbitration?

19 A. Just a moment.

20 I have the document in front of me, but
21 it reflects Ameritech's changes to it. It does not
22 reflect the reciprocal compensation language we've

1 proposed.

2 Q. All right.

3 A. Which is attached to the petition for
4 rehearing.

5 Q. When you said petition for rehearing, you
6 mean it was attached to the petition for
7 arbitration?

8 A. Yes.

9 Q. I think Attachment E?

10 A. Yes.

11 Q. Assume with me, if you will, that as a
12 result of this arbitration XO winds up with the
13 interconnection agreement that it wants and that
14 the Illinois Commerce Commission then approves that
15 agreement so that becomes the XO Ameritech Illinois
16 interconnection agreement.

17 We okay so far?

18 A. Yes.

19 Q. Assume then that we start doing business
20 under that agreement and we're about, let's say,
21 five or six weeks into performance under that
22 agreement and we, Ameritech Illinois, get a bill

1 from you, XO, for reciprocal compensation charges.
2 And assume that that bill includes charges for
3 traffic that we have delivered to you for you, in
4 turn, to deliver to your ISP customers.

5 Are we together so far?

6 A. Yes.

7 Q. In fact, the bill would include such
8 traffic, would it not?

9 A. Yes.

10 Q. Now, assume then that we write you a letter
11 and we say, We have no obligation, XO, to
12 compensate you for this ISP-bound traffic because
13 there's nothing in our agreement that the
14 Commission approved that says that we have to
15 compensate you for this traffic.

16 I assume you would disagree with us on
17 that?

18 A. Yes.

19 Q. We would then say to you, Point to us, if
20 you will, point us to the language in our
21 agreement, this agreement that the Commission has
22 approved at XO's behest, that says somehow that we

1 have to compensate you for ISP-bound traffic that
2 we deliver to you.

3 A. One would be that I believe the FCC order
4 gives us that right to ISP compensation.

5 Q. Let me try to get you back on track.

6 In this hypothetical we have an
7 agreement, right?

8 A. Yes.

9 Q. And it is the agreement that you want,
10 correct?

11 A. Correct.

12 Q. And Ameritech Illinois is saying to you,
13 Under our agreement, the one that you wanted and
14 you got the Commission to approve, we say that we
15 don't have to compensate you for ISP-bound traffic.

16 And you're disagreeing with us and I'm
17 now asking you point me to the place in the
18 agreement where it says we have to pay you for this
19 traffic?

20 A. I would point to the price list that shows
21 the reciprocal compensation charges which would
22 apply to both ISP and non-ISP traffic for recip

1 comp.

2 Q. Where does it say that? Where does it say
3 that these prices apply to ISP-bound traffic?

4 A. In price list 1, PS1 of the agreement
5 provides reciprocal compensation rates that you
6 would pay to XO.

7 Q. Are you telling me that --

8 A. All traffic under the 3-to-1 ratio by the
9 FCC is compensatable.

10 Q. I want you to talk about --

11 MR. MOORE: Can he please finish his answer.

12 MR. FRIEDMAN: Q I'm sorry, go ahead.

13 A. Is compensatable at these rates. And above
14 those rates would be compensated if you opt in to
15 the lower rate established by the FCC.

16 Q. What price sheet are you referring to?

17 A. The PS1 in the red lined interconnection
18 proposal.

19 Q. On PS1 is there any sort of indication that
20 these reciprocal compensation prices apply to
21 ISP-bound traffic?

22 A. In negotiations -- on that page, it says

1 recip comp. I would read it to say that. We do
2 not have language in there clarifying that, but nor
3 did we get to the point of being able to agree on
4 final language on compensation. So I think it
5 would be reflected in the ultimate final document.

6 Q. I thought we were arbitrating the ultimate
7 final document here, aren't we?

8 A. We're arbitrating, I believe, the issue of
9 whether or not we get the permanent structure as in
10 the Focal, and our view is that includes ISP and
11 non-ISP traffic.

12 Q. Let's back up a minute.

13 All of this started by my asking you if
14 you could get in front of you the agreement that
15 you want to come out of this arbitration with,
16 correct?

17 A. I have to go back and look or make the
18 assumption that you have the agreement in front --
19 I can't recall exactly how you worded it.

20 But the bottom line is this agreement to
21 us would include ISP and non-ISP.

22 Q. Am I correct that the agreement that you

1 have so far told the Commission you want is that
2 old Focal agreement, okay, but with your Section
3 4.7 and its various subparts; that is, the Section
4 4.7 that appeared in Attachment E to your
5 arbitration petition substituted for the Focal 4.7?

6 A. Yes. Our view is that because we get the
7 ISP traffic under the federal order, if Ameritech
8 or SBC believes it doesn't do that, we were willing
9 to put that sentence back in.

10 To be clear, the intent of XO is to get
11 ISP compensation. So if you don't --

12 Q. But you are proposing a contract which does
13 not require us to pay you for ISP-bound traffic,
14 are you not?

15 A. No, I believe it does.

16 Q. You do, okay.

17 A. I would go on to conclude that if it
18 doesn't and there's disagreement now, we should
19 amend it to reflect clearly that it should.

20 Q. If the FCC made anything clear in its ISP
21 compensation remand order, it is that ISP-bound
22 traffic is not subject to reciprocal compensation

1 under Section 251(b)(5) of the 1996 Act, correct?

2 A. It is subject to either you opting in in
3 the price they establish or the state-approved
4 rate, which in this case is the recip comp rates in
5 this docket.

6 MR. FRIEDMAN: I'm going to move to strike that
7 answer because it wasn't responsive to the
8 question.

9 MR. MOORE: It's precisely responsive.

10 JUDGE GILBERT: My problem with both the
11 question and the answer is that they are precisely
12 what I suggested this case would become about and
13 why I said we could probably do this in written
14 comment because you're now debating the contents of
15 the ISP order.

16 I'm not going to strike either the
17 question or the answer, but I'm going to get at
18 some point impatient with the whole line of
19 inquiry.

20 MR. FRIEDMAN: Q Do you have available to you
21 the direct testimony of Ameritech Illinois witness
22 Panfil.

1 A. I do.

2 Q. If you could get that in front of you and

3 turn to Page 20, I want to ask you a question.

4 A. Okay.

5 Q. Are you there?

6 A. I'm there.

7 Q. Starting on line 17, Mr. Panfil says: End

8 users may access -- and then goes on, correct? I'm

9 just asking to make sure we're on the same place.

10 A. On line 17?

11 Q. Yes.

12 A. I don't see it on my 17 or my counsel's.

13 MR. MOORE: We have PDF and word files floating

14 around --

15 MR. FRIEDMAN: Q Let's do this then: Can you

16 find a question that says, Please describe how end

17 users can dial an ISP call? It should be in the

18 vicinity of where you are.

19 A. I've got it.

20 Q. Do you see the question?

21 A. Yes.

22 Q. And do you see where the answer starts with

1 the words "end users may access"?

2 A. Yes.

3 Q. I would like for you to just read to
4 yourself, okay, the answer starting there, and then
5 you can stop right before the last line before the
6 last sentence of the answer. Just tell me when
7 you've read through that.

8 A. Okay. I have read it.

9 Q. Do you disagree with anything that
10 Mr. Panfil says in those sentences? And to give
11 you a second to think about it, I guess I will read
12 them into the record -- it will just take a minute
13 -- since we have some maybe confusion about line
14 numbers.

15 The question pertains to the following
16 testimony not yet admitted in evidence: End users
17 may access the internet a number of different ways.
18 Other than dialing a local number, end users may
19 access their ISP provider by dialing an 800 number
20 or via a foreign exchange service. Although not as
21 common, end users may dial 1-plus and incur inter
22 or intraLATA toll charges to access the internet.

1 In the reciprocal compensation appendix,
2 Ameritech Illinois is proposing language that
3 specifically addresses the appropriate intercarrier
4 compensation mechanism for each of these scenarios.

5 So, again, Mr. Kinkoph, the question
6 was: Do you disagree with any of that?

7 A. Yes.

8 Q. What?

9 A. I believe that the FCC order applies only
10 to dial-up compensation. That 800 traffic, other
11 type traffic, foreign exchange would be treated as
12 stated in the Focal agreement, access charges, et
13 cetera.

14 Q. I'm not understanding how that's a
15 disagreement with what Mr. Panfil says. He said --
16 let's go -- he said -- he begins by saying, End
17 users may access the internet a number of different
18 ways.

19 You agree with that, right?

20 A. Yes.

21 Q. And then he says, Other than dialing a
22 local number, they may access their ISP provider in

1 some other ways that he identifies.

2 A. Okay.

3 Q. Did you disagree with that?

4 A. No.

5 Q. And then he goes on and says, Although not
6 as common, end users may dial 1-plus and incur
7 inter or intraLATA toll charges to access the
8 internet.

9 That's true, isn't it?

10 A. Yes.

11 Q. And then in the last sentence I asked you
12 to look at, he says that in the reciprocal
13 compensation appendix, Ameritech Illinois is
14 proposing language that specifically addresses the
15 appropriate intercarrier compensation mechanism for
16 each of these scenarios.

17 Do you disagree with that?

18 A. No.

19 Q. So as it turns out, you don't really
20 disagree with any of the sentences that I read out
21 loud?

22 A. I don't disagree with -- that Mr. Panfil

1 says what he says in that paragraph. What I -- no,
2 I don't believe I disagree with it.

3 Q. You don't disagree with the substance of
4 what he's saying in those sentences?

5 A. Exactly.

6 Q. I want to ask you to tell us where in the
7 interconnection agreement as XO would have it,
8 where does the agreement deal with specifically
9 ISP-bound calls that use an 800 number?

10 In other words, if you get the agreement
11 that you want and we want to look at that agreement
12 later to find out how we're supposed to deal with
13 ISP-bound calls made by an 800 number, where does
14 the agreement answer that question for us?

15 A. I believe for intra and interstate traffic
16 that is not local, it would be governed by the
17 applicable access tariffs.

18 Q. Where in the agreement that you want can we
19 find an answer to the following question, namely,
20 the question, how, if at all, are we going to
21 compensate each other for ISP-bound traffic that is
22 originated by dialing an 800 number?

1 A. Give me a moment.

2 I would look to Roman numeral 4.6.1,
3 measurement of billing, Page 15 of the agreement
4 and Roman numeral 4.6.2 talking about the
5 applicability of applying the FCC access tariffs to
6 intraLATA and interLATA toll traffic.

7 Q. If we got into a disagreement during the
8 course of this agreement, if XO and Ameritech
9 Illinois did, about whether or how much to
10 compensate each other for ISP-bound traffic that's
11 originated by dialing an 800 number, you're saying
12 if we look there to those sections you've just
13 pointed to, we'll find an answer to our question?

14 A. Yes.

15 Q. What answer do those sections give?

16 A. You would bill them at the applicable 800
17 access rates, switched access rates.

18 Q. What language do you see there -- why don't
19 you read it into the record. What language do you
20 see that says, in effect, This is how we will
21 compensate each other for ISP-bound traffic of this
22 sort?

1 A. It talks generically about traffic, not ISP
2 specifically.

3 Q. So if we, for example, took the position
4 that that language doesn't deal with ISP-bound
5 traffic, we might have a fight on our hands because
6 you can't -- right?

7 A. Yes, we would argue that it does.

8 Q. Okay. Is there anywhere in the agreement
9 as you want it to be that tells us how to
10 compensate each other for ISP-bound traffic that is
11 originated by someone making a 1-plus call, that
12 is, a call that would normally be subject to
13 intraLATA or interLATA toll charges?

14 A. The 4.7 section that we proposed states
15 that all exchange access traffic and intraLATA toll
16 traffic shall continue to be governed by the terms
17 and conditions of the applicable federal and state
18 tariffs. Compensation for traffic that is
19 delivered in the agreement shall be pursuant to
20 Section 7.2.

21 Q. So for ISP-bound traffic -- you're saying
22 that in your view that applies to ISP-bound

1 traffic, right?

2 A. Yes. I think I already said that.

3 Q. Now, of course it doesn't say so in so many
4 words does, it?

5 A. No. It's XO's position -- and I have said
6 for the record -- is that it includes both ISP and
7 non-ISP traffic.

8 Q. Do you have access to the appendix
9 reciprocal compensation that Ameritech Illinois is
10 proposing in this arbitration?

11 A. Just a moment. Yes, I do.

12 Q. Could you please turn to Section 5.5 of
13 Ameritech Illinois's proposed appendix reciprocal
14 compensation? Just tell me when you're there.

15 A. I'm there.

16 Q. Could you please read through Section 5.5
17 to yourself and then tell me if XO has any
18 objection to that language in particular?

19 A. Yes, we do have objections.

20 Q. What is your objection?

21 A. One is -- now, your question is objection
22 to that paragraph as it stands by itself, is that

1 --

2 Q. Let me -- to help you narrow it down, I
3 think we all understand that XO objects to the
4 Commission considering this appendix in the first
5 place, right?

6 A. Correct.

7 Q. Put that aside for a minute.

8 The question is: Does XO have any
9 problems with the language in 5.5 in particular?

10 A. Yes. It talks about minutes to ISPs must
11 be shown separately, and there are difficulties in
12 identifying specifically ISP traffic.

13 That's why the FCC talks about a 3-to-1
14 ratio, because there have been cases in which
15 companies allege that they are being billed for
16 ISP. When you do audits, they're not, et cetera.
17 So to simply say you got to split them out is a
18 very difficult technical thing to do.

19 Q. Does it say there that minutes of use must
20 be shown separately?

21 A. ISP -- minutes of use to ISPs must be shown
22 separately on the monthly usage detail.

1 Q. Go back and look again. Does it say
2 minutes of use to ISPs must be shown separately?

3 A. May be shown separately.

4 Q. So it says "may."

5 Now, in light of that, does XO have any
6 objection to 5.5 now that you understand that it
7 says "may" rather than "must"?

8 A. I would have to ask what all ISP is defined
9 as. I mean, our view was that -- let me just read
10 this again.

11 If this is saying simply treat ISP in a
12 billing environment the way we would treat any
13 other call, I don't think we have a problem with
14 that. What I'm not clear of is if Ameritech
15 believes this says something else.

16 Look through the negotiations, you'll
17 understand my comment. It says all ISPs shall be
18 subject to the same conditions regarding switch
19 recording, CPNI signaling, and other usage detail,
20 which would imply to me that we simply need to make
21 it look on the bill like any other call. That's
22 what that first sentence seems to say to me. And

1 then we may show it separately if we wish, as you
2 corrected me.

3 So based on my reading of that, I don't
4 have any problem --

5 Q. I'm sorry?

6 A. Based on my understanding of how I'm
7 reading this, I don't think we have a problem.

8 Q. I want to ask you the same question for
9 Section 6.3 of the appendix reciprocal
10 compensation. If you would just read it to
11 yourself and then tell me whether XO has any
12 problems with that section.

13 A. I've read it.

14 Q. Any problems with it?

15 A. Well, the question becomes the
16 identification -- and maybe I'm misreading it --
17 but the trunking of ISP calls on an interexchange
18 basis is identifying an ISP call. I do not -- I
19 believe there are difficulties in doing that.

20 So if I'm reading this, we're saying
21 that the routing of ISP calls is treated like any
22 other -- as I'm saying this out loud, I apologize

1 if I'm talking in circles here -- that the trunking
2 of ISP calls, if we can't identify that from
3 another interexchange call, interexchange -- on an
4 interexchange basis, yes, it would be treated like
5 any other call and probably trunked the same way.

6 Q. I'm a little uncertain now whether you're
7 telling me you have a problem with this language or
8 not.

9 A. Let me boil it down, sorry. I don't
10 believe we would have a problem with that.

11 Q. Okay.

12 A. Based on how I'm reading it.

13 Q. Mr. Kinkoph, did you first become familiar
14 with Section 252 of the 1996 Telecommunications Act
15 when you were at LCI?

16 A. I did, yes.

17 Q. When was that, 1996 or '97?

18 A. '96, yeah, the passage.

19 Q. Were you responsible for some Section 252
20 matters in 1998 and 1999 after you joined NextLink?

21 A. Yes.

22 Q. Now, a few months ago when Ameritech

1 Illinois and XO found themselves in disagreement
2 about -- I'm going to phrase this the way I think
3 XO would think of it -- about XO's right under
4 Section 252(i) of the Act, were you personally
5 involved in the making of the decision to file an
6 arbitration petition?

7 A. Yes.

8 Q. Did you give consideration to trying
9 some -- to taking some other approach to getting
10 your 252(i) rights resolved; that is, some kind of
11 proceeding other than an arbitration?

12 MR. MOORE: At this point I'd have to object
13 that that discussion would have been with counsel
14 and would be privileged. It's calling for
15 privileged information.

16 MR. FRIEDMAN: I'll refine the question a little
17 bit.

18 Q. Did you, Mr. Kinkoph, yourself -- you can
19 just answer this yes or no -- give consideration to
20 the possibility of trying to get a determination on
21 XO's Section 252(i) rights by some method other
22 than an arbitration?

1 A. No.

2 Q. As you sit here today, do you know what the
3 basis is for XO's view that a state commission can
4 decide questions about Section 252(i) in an
5 arbitration?

6 MR. MOORE: That calls for a legal conclusion.

7 MR. FRIEDMAN: If you listen to the question, it
8 doesn't. It's a yes or no question at the moment.

9 JUDGE GILBERT: Do you want the question back?

10 THE WITNESS: Please.

11 (Record read as requested.)

12 JUDGE GILBERT: You can answer that.

13 THE WITNESS: I'm just thinking it out here.

14 So do I know XO's view as to why I think
15 this Commission can address this -- I know you just
16 read it back. I'm just trying to think it out.

17 MR. FRIEDMAN: Q Let's start with just a yes or
18 no, and then we may go on depending on what you
19 say.

20 I'm just asking if right now you have in
21 your head some understanding of the basis for XO's
22 view that the Illinois Commerce Commission in this

1 arbitration can decide things about XO's rights
2 under Section 252(i).

3 A. Yes.

4 Q. And what is that?

5 MR. MOORE: I renew my objection that this is
6 calling for a legal conclusion. This is something
7 we can do in our briefs. It's not for Mr. Kinkoph
8 to discuss.

9 JUDGE GILBERT: You're asking what is the
10 witness's understanding of what --

11 MR. FRIEDMAN: I don't think --

12 JUDGE GILBERT: Mr. Friedman, please let me
13 finish.

14 MR. FRIEDMAN: I'm sorry.

15 JUDGE GILBERT: Are you asking the witness what
16 is his understanding of his company's position?

17 MR. FRIEDMAN: Yes.

18 MR. MOORE: It's a back-door way of asking the
19 legal -- for a legal conclusion.

20 MR. FRIEDMAN: I'll withdraw the question, make
21 it easier. We can brief.

22 Q. If Ameritech Illinois were tomorrow,

1 Mr. Kinkoph, to make an offer to all competing
2 local exchange carriers and wireless carriers in
3 Illinois to exchange all 251(b)(5) traffic and all
4 ISP-bound traffic at the FCC rate caps, would XO
5 accept that offer, or would it reject that offer?

6 A. One -- I mean, I'm a little confused by the
7 question because I don't think there's a right to
8 refusal. It would be governed by your right to opt
9 in and then the change of law provision in the
10 interconnect. So I'm confused by the would we
11 accept or reject that offer to accept your opt-in
12 request.

13 Q. Let's back up and talk about it a little
14 bit.

15 Do you share my understanding that under
16 the FCC's ISP remand order Ameritech Illinois has
17 the right if it does certain things to insist that
18 everyone exchange ISP-bound traffic with Ameritech
19 Illinois at the FCC's rate caps?

20 A. I agree with that with one caveat, and I
21 think the FCC addressed that, which is depending on
22 the change of law provisions on existing

1 agreements.

2 Q. In order to put that to one side, let's
3 assume that we're talking about this new agreement?

4 A. Okay.

5 Q. That would eliminate the concern about
6 change of law, correct?

7 A. Right.

8 Q. So we have a shared understanding that
9 Ameritech Illinois has the right to insist that all
10 carriers exchange ISP-bound traffic with Ameritech
11 Illinois at the FCC's rate caps under certain
12 conditions, correct? Yes?

13 A. Yes.

14 Q. And in particular, in order to exercise
15 that right, Ameritech Illinois has to offer all
16 carriers in Illinois -- it could offer to all
17 carriers in Illinois to exchange all 251(b)(5)
18 traffic that is non-ISP bound traffic at those same
19 capped rates, correct?

20 A. Correct.

21 Q. Put XO aside for a minute. Assume there's
22 a carrier out there called carrier ABC.

1 Are you telling me it's your
2 understanding that carrier ABC upon receiving
3 Ameritech Illinois's offer has to say yes?

4 A. No. I think that they have to enter into
5 negotiations to amend their interconnection
6 agreement. We put aside the change of law so --
7 but assume it's a new agreement. You say we're
8 opting in. New agreements under the FCC order need
9 to reflect that opt-in if you've elected that.

10 Q. Let's talk for a second about carrier ABC,
11 and then I want to turn to XO, okay.

12 In our hypothetical, Ameritech Illinois
13 makes this offer to the world, okay. Part of the
14 world is carrier ABC.

15 As you understand it, does carrier ABC
16 have the right to say to Ameritech, Thank you for
17 the offer, but we decline your offer, okay. We
18 will exchange traffic with you, non-ISP bound
19 traffic, at the current state rates because we
20 don't accept your offer. Though we understand that
21 by making this offer to everyone in the world,
22 Ameritech, you have qualified to exchange all

1 ISP-bound traffic at the FCC caps.

2 Can carrier ABC say that?

3 A. Give me a moment here.

4 So in your scenario, carrier ABC can
5 basically say, No, thank you, to the ISP portion --
6 I'm sorry, reverse that, to the non-ISP portion;
7 will continue at the state based rate, but we will
8 exchange ISP at the lower ISP rate?

9 Q. At the FCC cap.

10 The question is: Can they do that?

11 A. My personal reading, which I'm not an
12 attorney, would be no.

13 Q. So if I were to say to you, Let's pretend
14 that Ameritech Illinois made that offer to you, to
15 XO -- let me change the question.

16 I want you to assume for the purpose of
17 my question that you're wrong, okay. I want you to
18 assume for the purpose of my question that if
19 Ameritech makes this offer to the world, each
20 carrier can decide for itself whether to accept or
21 decline the offer. And that for the carriers that
22 decline the offer, they're going to be exchanging

1 ISP-bound traffic with Ameritech at the FCC caps
2 because Ameritech is qualified to insist on that by
3 making the offer to the world. But carriers who
4 decline the offer will be exchanging 251(b)(5)
5 traffic at the going state rate. So I want you to
6 assume that that is the case.

7 Under those circumstances if Ameritech
8 made this offer to XO, do you know whether XO would
9 accept or reject the offer?

10 A. Don't know.

11 Q. You haven't thought about it?

12 A. Haven't thought about it, right.

13 Q. You've been assuming XO has no choice?

14 A. Right. Haven't thought of that
15 hypothetical.

16 MR. FRIEDMAN: No more questions from me at this
17 time. Thank you.

18 JUDGE GILBERT: Staff?

19 MS. KELLY: No questions.

20 JUDGE GILBERT: Did you want to confer?

21 MS. KELLY: I'm sorry.

22 MS. STEPHENSON: Can we take a brief five-minute

1 break? Thanks.

2 JUDGE GILBERT: Just keep the five minutes to
3 five minutes.

4 (Recess taken.)

5 (Whereupon, Ameritech
6 Exhibit Nos. 1, 2, 3 were
7 marked for identification.)

8 JUDGE GILBERT: We're back on the record for
9 staff cross.

10 MS. KELLY: Staff has one brief question.

11 CROSS-EXAMINATION

12 BY

13 MS. KELLY:

14 Q. As of today, how do you -- do you know
15 whether Ameritech has elected to use the rate caps?

16 A. To the best of my knowledge, they have
17 elected not -- they have not elected the FCC rate
18 caps for use.

19 MS. KELLY: Okay. Thank you.

20 JUDGE GILBERT: Okay. I have a couple questions
21 which I'll ask at this juncture so that during
22 redirect you can address those as well, if you

1 like, and during recross.

2 EXAMINATION

3 BY

4 JUDGE GILBERT:

5 Q. If you would look at Page 7 of XO
6 Exhibit 3, which is essentially your response to
7 staff testimony?

8 A. Okay.

9 Q. Page 7, and there's the indented material
10 there that starts on line 7 of Page 7.

11 And can you tell me if the passages that
12 are lined out on Page 7 are or are not included in
13 XO's preferred outcome in this arbitration?

14 A. We struck the language in 4.7, but we did
15 that thinking that we had the right under the FCC,
16 and we do have the right under the FCC for ISP
17 traffic.

18 Striking it, there was no intention to
19 eliminate the outcome of that, which is to get
20 compensated for ISP traffic. And we've
21 communicated that to Ameritech that our intent is
22 to be compensated for ISP traffic. So by striking

1 that, there was no intent to eliminate it. It was
2 just -- it was eliminated.

3 Q. So I think the last sentence of your answer
4 actually responds most directly to my question, and
5 that is the material that is stricken is not part
6 of the XO position in this arbitration?

7 A. This language is not before the Commission,
8 but it is XO's position that we do get compensated
9 for ISP. I just -- to clarify, I just don't want
10 it to be taken that by striking this that we're not
11 asking for compensation of ISP.

12 Q. I get that. You're being a good witness
13 and trying to think of what I'm trying to do to
14 you, and I'm not trying to do that to you.

15 I'm just trying to determine whether
16 this lined out material is, in fact, excluded from
17 your company's requested outcome in the case, and
18 as of now, it is; is that correct?

19 A. Yes.

20 Q. Okay. And your Exhibit E -- I should call
21 it Attachment E to the petition does represent the
22 language that XO wants included in the ultimate

1 interconnection agreement, correct?

2 A. That is correct.

3 Q. And the only difference between the two
4 would be the language that is lined out on Page 7
5 of your reply to staff's testimony, correct?

6 A. Correct.

7 Q. Is it your understanding that the portions
8 that were deleted as shown here on Page 7 were
9 deleted because you personally -- well, let's say
10 XO as a company believes that they were not
11 necessary?

12 A. The striking of this in hindsight should
13 have been -- I believe for clarification of this
14 ISP issue should have been left in.

15 We're doing three arbitrations. It was
16 struck in Michigan because it's an arbitrated
17 language can be -- we've talked about this at the
18 time of the filing. I don't believe that it's
19 necessary to be compensated for ISP to have this
20 language in, but in hindsight now it probably would
21 have been best to leave it in just to eliminate the
22 need to come back and add language, I think, in the

1 cleanup document to clarify the ISP issue.

2 Q. If the interconnection agreement ultimately
3 approved by the Commission were to include this
4 language, would XO object to that?

5 A. No, it would not.

6 JUDGE GILBERT: That's all I have.

7 Redirect?

8 MR. MOORE: Just a few questions.

9 REDIRECT EXAMINATION

10 BY

11 MR. MOORE:

12 Q. Let me follow-up on Judge Gilbert's
13 questions.

14 XO's essential position in this case is
15 that it be paid for the termination of ISP traffic
16 at the rate that is appropriate for the means by
17 which that traffic reaches XO; is that correct?

18 MR. FRIEDMAN: Object to the form of the
19 question. I would hope that we could do this
20 right. You're not allowed to lead your witness.

21 JUDGE GILBERT: I will confess that I was half
22 listening, so unless you want to rephrase, I'll

1 have it read back.

2 MR. MOORE: Go ahead and read it back. It's an
3 introductory question that's appropriate at this
4 point.

5 (Record read as requested.)

6 JUDGE GILBERT: The objection, Mr. Friedman, is
7 that it's leading?

8 MR. FRIEDMAN: Leading.

9 MR. MOORE: My response is it's introduction to
10 a line of direct questioning.

11 JUDGE GILBERT: I'll overrule. I mean, let me
12 just -- technically, you're right, it's leading.
13 But I'm kind of thinking, so what. So let's go.

14 THE WITNESS: That's correct.

15 MR. MOORE: Q Now, Examiner Gilbert was
16 addressing language that would -- in 4.7.

17 What type of traffic is discussed in the
18 stricken language that you discussed with
19 Judge Gilbert.

20 A. It addressed internet service provider
21 traffic.

22 Q. Now, would that be traffic that reaches XO

1 from local exchange calls or any type of call
2 including 1-plus dialing or 800?

3 A. Well, XO's position is that the FCC order
4 address dial-up in that this would require
5 compensation of the applicable rate. If it came to
6 us as 800, it would be pursuant to the access
7 tariffs. If it came to us as dial-up ISP, it would
8 be compensated as recip comp.

9 Q. Mr. Friedman had you look at some of the
10 sections within the appendix recip comp,
11 specifically 5.5, 6.3.

12 Is it my understanding you said XO
13 essentially has no objection to that language?

14 A. That is correct.

15 Q. Is it your -- do you believe that the
16 inclusion of such language is necessary under the
17 FCC order?

18 A. No, I do not.

19 Q. Why not?

20 A. The FCC order does not contemplate any
21 changes to existing agreements or additional
22 language to reflect their order.

1 Q. And would that be for -- is that your
2 opinion based on the fact that 5.5 and 6.3 discuss
3 nonlocal exchange traffic or some other reason?

4 A. Let me read the sections.

5 Yeah, the FCC order was only applicable
6 to dial-up traffic, and so the FCC order was clear
7 that the issue at hand was simply the establishment
8 of rates. If they opted in in 3.1, additional
9 language to clarify compensation of other traffic
10 would be pursuant to the Focal agreement before us.

11 JUDGE GILBERT: Let me interpose a question.
12 Define dial-up for the record as you mean it.

13 THE WITNESS: Dial-up meaning a local dial-up
14 call, not 800, not dedicated. So 1-plus type call,
15 a local call.

16 MR. MOORE: Q Just in geography, can you expand
17 upon that? What sort of distance would be a local
18 call as opposed to some of the others.

19 A. Calls within -- I view it as calls, for the
20 sake of simplicity, calls made that are
21 within -- go to an NPNX within the local calling
22 area. Not an intraLATA, not an interLATA call, 800

1 type.

2 Q. Based on your questioning from
3 Mr. Friedman, is there a concern that Ameritech may
4 argue in the future that the lack of specific
5 provisions for such nonlocal exchange calls
6 terminating with ISPs could result in disputes with
7 Ameritech?

8 A. Yes, I think from the line of questioning
9 that Ameritech would attempt to challenge that this
10 agreement doesn't allow for compensation of ISP.

11 Q. So based upon that, what would be your
12 opinion about allowing for making the changes to
13 the agreement recommended by Ameritech in its
14 Section 5.5 and 6.3 of appendix recip comp?

15 A. I think language would need to be added
16 whether it's 5.5, 6.3, or language as the Judge had
17 recommended be left in would clarify that ISP would
18 be compensated.

19 Q. Now under --

20 JUDGE GILBERT: Just a moment. I didn't
21 recommend that you do anything. I just want to be
22 clear about that.

1 THE WITNESS: I'm sorry.

2 MR. MOORE: Q Is it your opinion that Ameritech
3 or XO will need to identify ISP traffic and
4 segregate it from other traffic in the event that
5 Ameritech decides to opt in to the FCC order and
6 its price caps.

7 A. No, we do not have to identify ISP traffic
8 under the FCC order. The FCC identified that as a
9 potential problem and established a 3-to-1 ratio,
10 meaning that when one company is out of balance
11 greater than 3-to-1, it would be assumed to be ISP
12 traffic over the 3-to-1 ratio. Below the 3-to-1
13 ratio, it's presumed to be non-ISP.

14 Q. Let's assume for the moment that XO and
15 Ameritech end up having an agreement that results
16 in payment of reciprocal compensation at the rate
17 proposed by XO in this arbitration proceeding,
18 which is essentially the Commission rate
19 established in the TELRIC docket for ISP traffic
20 and the opt-in rate for Section 251(b)(5) traffic.

21 In that situation, do you see a need to
22 identify and desegregate ISP traffic?

1 A. No, I do not.

2 Q. Why is that?

3 A. Again, there's -- it's all treated the
4 same. If they opt in, the 3-to-1 ratio comes into
5 play. Below the 3-to-1 ratio would be billed at
6 the 252(b)(5) rates.

7 MR. MOORE: I have no other questions.

8 JUDGE GILBERT: This line has actually elicited
9 a couple additional questions from me, but so that
10 I keep the balance here, why don't you go ahead
11 with your recross, and staff if you have any
12 recross. I'll ask my additional questions, and I
13 will give everyone another brief round based only
14 on what I've done.

15 You're up.

16 RE CROSS - EXAMINATION

17 BY

18 MR. FRIEDMAN:

19 Q. Mr. Kinkoph, I think I heard you say in
20 response to a question asked by Mr. Moore that the
21 FCC's order does not contemplate that parties'
22 interconnection agreements would include language

1 reflecting the order.

2 Now, let's just assume that that is what
3 I heard.

4 A. Okay.

5 Q. Is that what you meant?

6 A. To clarify my question, there is no
7 requirement to amend the interconnection agreements
8 to require new trunking, new rearrangement, et
9 cetera.

10 I can see a need for language, or we
11 would not oppose language that would simply say if
12 you opt in, just down the road, this is what would
13 occur; we would go to these rates, the 3-to-1 ratio
14 would be established, and a 10 percent growth cap.
15 So I would see some potential need if we wanted to
16 to put that language in.

17 Q. Let's go back then, if we could, to XO
18 Exhibit 3, your testimony in reply to James
19 Zolnierrek's testimony, and I want to follow-up on
20 some questions that the judge asked you and your
21 attorney asked you about this stricken out language
22 in 4.7.

1 There was some discussion about the
2 possibility of that language being included in the
3 interconnection agreement that comes out of this
4 arbitration, correct?

5 A. Correct.

6 Q. That language -- I'm focusing on the
7 language now -- could not lawfully be included in
8 our agreement, could it, because it's contrary to
9 current law, right?

10 A. I disagree.

11 Q. Well, let's look at what it says. It says,
12 Pursuant to the arbitration decision of the
13 Commission in Docket No. 0027, the reciprocal
14 compensation arrangements are applicable to
15 ISP-bound traffic.

16 Are you familiar at all with the
17 Commission's decision in that docket?

18 A. I'm not intimately familiar. I have seen
19 it.

20 Q. Do you know that what happened in that
21 docket, 00-0027, was that the Illinois Commerce
22 Commission determined that ISP-bound traffic is,

1 quote, local, closed quote, and therefore is
2 subject to the reciprocal compensation requirements
3 of Section 251(b)(5) of the 1996 Act?

4 A. Okay.

5 Q. Did you know that?

6 A. I guess I don't recall that.

7 Q. All right. Will you take my word for that
8 for the moment?

9 A. Yes.

10 Q. Now, the FCC in its ISP remand order has
11 ruled that ISP traffic is not local but rather is
12 interstate and is not subject to reciprocal
13 compensation under section 251(b)(5), correct?

14 A. It is -- if you do not opt in, we would be
15 subject to the same rates for --

16 Q. The question does -- I'm sorry, go ahead.

17 A. No, I'm fine.

18 Q. I'm not asking you a question about rates,
19 okay.

20 Isn't it true that the FCC has ruled
21 that ISP-bound traffic, A, is not local but rather
22 is interstate; and, B, therefore is not subject to

1 reciprocal compensation under the Act, although as
2 we all understand, the FCC then went along to
3 establish a regime for intercarrier compensation
4 for that traffic; isn't that right?

5 A. Yes.

6 Q. So if the Commission were to decide in this
7 arbitration that the parties' contract should say
8 that pursuant to this Commission's decision in
9 00-0027, that is, a decision that ISP traffic is
10 local and subject to reciprocal compensation, the
11 parties will compensate each other in such and such
12 a fashion, that will be contrary to the law as it
13 now is, wouldn't it?

14 And, again, I'm not talking to you about
15 rates.

16 A. I believe the FCC order states or implies
17 that if you do not opt in it reverts to what was
18 established by this Commission; without using the
19 word rates, because that's part of it.

20 MR. FRIEDMAN: No further questions.

21 JUDGE GILBERT: Staff?

22 MS. KELLY: No questions.

1 JUDGE GILBERT: Okay. I just have some
2 additional questions I want to ask, and I'll give
3 everyone one more round but only based on the
4 substance of what I'm asking here.

5 MR. MOORE: May I ask something on what
6 Mr. Friedman just did?

7 JUDGE GILBERT: No.

8 FURTHER EXAMINATION

9 BY

10 JUDGE GILBERT:

11 Q. You've referred several times to the 3-to-1
12 ratio.

13 A. Correct.

14 Q. The 3-to-1 ratio, as I understand it from
15 my reading of the FCC order, is set out in number
16 paragraph 39 of that order, and I can show that to
17 you unless --

18 A. I have a copy, paragraph 39.

19 Q. Is it your understanding that that 3-to-1
20 ratio will apply in the event that Ameritech does
21 not elect the rate caps that are also established
22 as an alternative in this order?

1 A. No. My understanding is that it only
2 applies if they opt in to the FCC rate caps.

3 Q. Okay. So if Ameritech does not opt in to
4 those rate caps but instead reciprocal compensation
5 is pursuant to the state-authorized rate and
6 state-authorized mechanism, whatever that may be,
7 then the 3-to-1 ratio would not apply?

8 A. That is correct.

9 Q. Would XO not then have to identify and
10 segregate by jurisdiction the ISP-bound traffic
11 between itself and Ameritech?

12 A. Well, what you would do is ISP traffic
13 would be routed over the applicable local or
14 intraLATA, interLATA toll trunks.

15 If they're transmitted over local
16 trunks, you would receive recip comp on those
17 minutes. If it's over the inter, intraLATA toll
18 trunks, there would be access. So there would not
19 be additional segregation required than what we do
20 today.

21 Q. Okay. Did I misunderstand you then; did
22 you not say in response to a question from, I

1 believe, Mr. Friedman, that you're not able to make
2 those kinds of distinctions?

3 A. Correct. So -- that is correct. So when
4 somebody makes a toll call, whether it's ISP or
5 just a non-ISP call, it would go over the toll
6 trunks. We don't know the specific call is ISP.

7 If they make a local call, regardless of
8 what kind of local call, it would go over the local
9 trunks; but I can't tell you those calls going
10 across there whether they're ISP or non-ISP.

11 Q. Okay. And you would not attempt to further
12 identify the calls using the 3-to-1 ratio?

13 A. No.

14 Q. You were referring to that only in the
15 event that Ameritech elected the rate caps set out
16 in the FCC order?

17 A. Right. The FCC talked about the 3-to-1
18 being a presumption of not being ISP when it's
19 below the 3-to-1 ratio and then over being the
20 presumption that it is.

21 JUDGE GILBERT: All right. That's all I have.

22 Do you want to do redirect in response

1 to those questions?

2 FURTHER REDIRECT EXAMINATION

3 BY

4 MR. MOORE:

5 Q. Just real quickly to clarify, the 3-to-1
6 ratio, the 3 and the 1 we're talking about are not
7 local and ISP -- voice and ISP calls but rather
8 calls terminated on one carrier and calls
9 terminated on the other; is that correct?

10 A. Correct.

11 Q. So even on the 3-to-1, you're not measuring
12 ISP calls?

13 A. That's correct.

14 Q. The whole idea of 3-to-1 is to avoid having
15 to measure them?

16 A. Correct.

17 Q. When you say that there's no need to
18 measure under current or proposed regime, why is
19 that?

20 A. Because under the -- if they opted in, it
21 would be -- you would be compensated based on the
22 under 3-to-1 rate. If it's above 3-to-1, you would

1 be compensated at the lower transitional rate. If
2 they don't opt in, it would be at the
3 state-approved TELRIC rate.

4 MR. MOORE: I have no other questions.

5 MR. FRIEDMAN: None from me, thank you.

6 MS. KELLY: None from staff.

7 JUDGE GILBERT: Okay. Thank you, Mr. Kinkoph.

8 JUDGE GILBERT: I'm willing to plow ahead. I
9 don't know how the room is. People keep going
10 here, bring Mr. Panfil up?

11 MR. FRIEDMAN: Fine.

12 JUDGE GILBERT: Let's see how far we can get
13 with that and if we can take a little later lunch
14 or perhaps no lunch at all.

15 There will be questions for
16 Mr. Zolnierrek, I assume?

17 MR. FRIEDMAN: Ameritech Illinois does have
18 some.

19 JUDGE GILBERT: Okay. Let's see how it goes.
20 Let's go to Mr. Panfil now.

21

22

1 (Witness sworn.)

2 ERIC L. PANFIL,

3 called as a witness herein, having been first duly
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY

7 MR. FRIEDMAN:

8 Q. Please identify yourself for the record.

9 A. Eric L. Panfil.

10 Q. Do you have in front of you the direct
11 testimony of Eric L. Panfil in this matter which
12 we've marked as Ameritech Exhibit 1 and the reply
13 testimony of Eric L. Panfil which was marked as
14 Ameritech Exhibit 2 and the additional testimony of
15 Eric L. Panfil which we've marked as Ameritech
16 Exhibit 3?

17 A. Yes, I do.

18 Q. Did you prepare or cause to be prepared on
19 your behalf each of these pieces of testimony?

20 A. Yes, I did.

21 Q. Do you have any corrections to any of this
22 testimony?

1 A. No, I do not.

2 Q. If I asked you today the same questions

3 that appear in these three pieces of testimony,

4 would you give the same answers?

5 A. Yes, I would.

6 MR. FRIEDMAN: Ameritech Illinois offers into

7 evidence Ameritech Illinois Exhibits 1, 2, and 3.

8 JUDGE GILBERT: Is there objection?

9 MR. MOORE: No objection.

10 MS. STEPHENSON: No objection.

11 JUDGE GILBERT: Okay. The exhibits are admitted

12 subject to cross.

13 (Whereupon, Ameritech

14 Exhibit Nos. 1, 2, 3 were

15 admitted into evidence.)

16 JUDGE GILBERT: XO, do you want to start?

17 MR. MOORE: I should, by the way, say subject to

18 the motion to strike.

19 JUDGE GILBERT: Of course, understood.

20

21

22

1 CROSS-EXAMINATION

2 BY

3 MR. MOORE:

4 Q. Mr. Panfil, I'm Steve Moore. I'd like to
5 turn your attention to your direct testimony,
6 Exhibit 1. Page 10 of that testimony, the question
7 beginning on line 5, you say you stated earlier
8 that the current rate structure is not in
9 conformance with the FCC's rules.

10 Now, when you say the current rate
11 structure, are you referring to compensation for
12 traffic terminated with ISPs or traffic terminated
13 with both ISPs and any Section 251(b)(5) traffic?

14 A. I think really I'm referring to the rate
15 applied to Section 251(b)(5) traffic.

16 Q. Now, the existing rate structure is
17 contained in, among other things, Ameritech's filed
18 tariff for reciprocal compensation, correct?

19 A. That's correct, yes.

20 Q. Has that tariff been approved by the
21 Illinois Commerce Commission?

22 A. My understanding is it has been approved or

1 allowed to go into effect or there are a number of
2 ways that a tariff can go into effect. I'm not
3 sure if there was a specific order on this one or
4 whether it simply was allowed to go into effect on
5 its effective date.

6 Q. And that same rate structure is being
7 charged to most, if not all, of the carriers that
8 have interconnection agreements with Ameritech; is
9 that correct?

10 A. It certainly is used in a large number of
11 existing interconnection agreements, though there
12 are significant exceptions to that.

13 Q. Those have all been approved by the
14 Illinois Commerce Commission pursuant to its
15 authority under the Federal Act; is that correct?

16 A. That would certainly be my understanding,
17 yes.

18 Q. Has Ameritech or any party appealed any of
19 those decisions of the Illinois Commerce Commission
20 approving interconnection agreements based on an
21 argument that the current rate structure is not in
22 conformance with the FCC's rules?

1 A. Not to my knowledge.

2 Q. Now, Section 252(i) allows carriers to opt
3 in to the interconnection agreements of other
4 carriers; is that correct?

5 MR. FRIEDMAN: Objection, calls for a legal
6 conclusion. And it's Ameritech's position that
7 that is not correct as phrased.

8 JUDGE GILBERT: Well, as for you second
9 argument, you're essentially answering the question
10 for him.

11 The first argument is really again going
12 to the heart of my concern about how we're
13 conducting the case to begin with. You've asked
14 their witness repeatedly for legal interpretation,
15 and they're going to do the same thing with your
16 witness. I didn't want any of this, but I'm stuck
17 with it now. So objection overruled.

18 MR. MOORE: Q I'm not trying to trick you. Let
19 me just rephrase it.

20 252(i) is the general provision allowing
21 carriers to opt in to existing interconnection
22 agreements; is that correct.

1 A. That's my understanding, yes.

2 Q. And is there anything in the FCC's rules or
3 the Federal Act or the FCC's reciprocal
4 compensation order which prevents a party from
5 opting into the reciprocal compensation provisions
6 of an existing interconnection agreement for
7 251(b)(5) traffic?

8 A. There are certainly some qualifications,
9 number one, attached to the 251(b)(5) -- let me
10 start that over again. I'm drawing a blank now on
11 the specific. 252(i), is that right?

12 Q. 252(i), yes.

13 Other than the provisions in 252(i), is
14 there anything -- let me ask you this; let me
15 rephrase the question.

16 Has anything in the FCC's reciprocal
17 compensation order changed the right of the parties
18 to opt in to the Section 251(b)(5) reciprocal
19 compensation provisions of an existing agreement?

20 A. Ameritech Illinois believes that the FCC's
21 order on ISP compensation does open the door to the
22 renegotiation of those kinds of provisions. They

1 are related to -- very closely related to the
2 provisions for compensation of ISP-bound traffic.

3 Q. And I should have done this before; just to
4 be clear for the record, 251(b)(5) traffic, what
5 kind of traffic is that?

6 A. Well, it's often referred to as local
7 traffic, though in its order the FCC did remove the
8 term "local" from its rules.

9 Q. But is it also your understanding that in
10 light of the FCC ISP order that 251(b)(5) traffic
11 is local traffic that's not terminated with ISPs?

12 A. I would say that's a reasonably fair
13 description given the lack of precision of all of
14 the terms that we use in these contexts, yes.

15 Q. Now, is Ameritech's position that under the
16 FCC reciprocal compensation order the company has
17 the right to deny a party's request to opt in to
18 the reciprocal compensation provisions for
19 251(b)(5) traffic?

20 A. I believe it is, yes.

21 Q. And is there any place in the FCC order
22 that you can point me to where the FCC states that

1 proposition?

2 A. There is nothing that explicitly states
3 that proposition that I'm aware of.

4 Q. I'd like to turn your attention to the cost
5 studies that were performed in the TELRIC docket
6 that has been discussed in staff's testimony and
7 yours.

8 Did you didn't perform those studies, I
9 assume, did you?

10 A. I did not perform them personally.

11 Q. Did you testify in the TELRIC proceeding?

12 A. I did not.

13 Q. Would you consider yourself to be a cost of
14 service witness?

15 A. I have been in the past in some other
16 dockets at some other times. I have not done it
17 for a while.

18 Q. What sort of topics have you addressed in
19 your testimony in cost of service?

20 A. I sponsored pay phone cost of service
21 studies in dockets in the late '80s. I have
22 testified a number of times on the subject of

1 imputation testing, which is a form of cost of
2 service test, probably throughout the early 1990s.

3 I have, you know, had extensive contact
4 with and have worked closely with the people who
5 perform the component cost studies. Although I
6 have not performed component cost studies myself,
7 I've have been responsible on a number of occasions
8 for the assembly of components, if you will, the
9 understanding of the components, and the assembly
10 of those into full service cost studies.

11 Q. Now, when we turn to your direct testimony,
12 the cost of service study in the TELRIC docket
13 calculated a -- I'll call it for ease of use here
14 -- a unified rate which was a single charge for
15 each minute of use and it did that by adding the
16 duration cost on a permanent basis to the setup
17 cost, and those setup costs were divided by the
18 average hold time of three and a half minutes.

19 Is that essentially what was done?

20 A. That's a reasonable description, yes.

21 Q. Now, if a party had objected during that
22 case to whether a particular cost listed as a setup

1 cost should more appropriately be considered to be
2 a duration cost, that would not have affected the
3 final rate that came out of that docket, would it?

4 A. That's really, I think, impossible to say.
5 It would depend on the nature of the objection and
6 the nature of the specific cost itself.

7 Q. Well, what I'm talking about is just the
8 allocation between setup and duration.

9 Isn't it a zero sum gain; you take it
10 from one, it's got to go to the other?

11 A. Assuming that the numbers would be the
12 same, you might make that contention. However, I
13 don't think that you can postulate an objection to
14 the identification of a particular cost or a
15 particular cost source as being a setup cost
16 without questioning the way that that portion of
17 the cost study itself was done and the accuracy, if
18 you will, of the number itself.

19 Q. Let's assume there's a party that decides I
20 have no question that there's such a cost but I
21 believe it's more appropriate for duration instead
22 of setup.

1 In that situation, it's a zero sum gain,
2 correct?

3 MR. FRIEDMAN: Objection, asked and answered.

4 MR. MOORE: He didn't answer it. He then made
5 an assumption that the cost itself was being
6 challenged.

7 JUDGE GILBERT: I'll overrule it. It's
8 overruled. Go ahead.

9 THE WITNESS: I don't think you can make the
10 assumption that underlies the question. The
11 assumption that underlies the question is that
12 there is sort of this undisputed lump of total cost
13 that is arbitrarily being described as either a
14 setup cost or a duration cost and is simply spread
15 over some number of minutes. That's not
16 necessarily the way that costs are derived.

17 And you can't simply say that a cost
18 that is identified in a cost study as a setup cost
19 as a cost that occurs only once per call would
20 simply be a big lump of cost that would otherwise
21 be called a duration cost and would not change.
22 That's simply not the way that cost studies are

1 performed.

2 They go to a much lower and more
3 detailed level than that in terms of what the
4 components are that make up that cost and what the
5 causation is for that cost.

6 MR. MOORE: Q Now, in the TELRIC docket,
7 because the ultimate result was a single unified
8 charge, the parties had no incentive or reason to
9 argue over the allocation of cost between setup and
10 duration; is that correct.

11 A. They didn't necessarily have such an
12 incentive. However, again, to the extent that they
13 were concerned about the cost levels at all, they
14 would have had to have looked at the nature of the
15 cost and looked beyond the -- sort of the bottom
16 line result that says that for function X there is
17 a setup cost that is .00 whatever per call or per
18 message; that to the extent that anyone was going
19 to make an analysis to challenge those costs, they
20 would need to understand fundamentally how the cost
21 study was done and how those costs were derived.
22 And, you know, it wouldn't simply be a matter of,

1 well, I like the answer or I don't like the answer.

2 If someone objected to the costs
3 overall, it wouldn't have been on the basis of,
4 well, this setup cost really should be a duration
5 cost. They would have had to have gone into much
6 more detail in terms of the derivation of costs,
7 and the setup costs would have been looked at as
8 setup costs and the duration costs would have been
9 looked at as duration costs.

10 Q. But ultimately in that party -- in that
11 case what the parties were concerned with was the
12 total final figure; is that correct?

13 A. I would assume that that was the bottom
14 line of most of the parties in that case. But,
15 again, to the extent that any of them had any
16 concerns about the rate or the cost that was
17 resulting from there, they would have had to have
18 dug back into the bowels of the cost study on a
19 relatively detailed basis to identify whether their
20 concerns were justified or not.

21 Q. Now, I had earlier given you a hypothetical
22 of assuming that there's a cost that a party

1 doesn't dispute exists but simply disputes the
2 allocation between setup and duration.

3 Is it your testimony that such a
4 hypothetical is impossible?

5 A. I don't think I would say that it is
6 impossible; however, it is -- nor is it a
7 certainty. It depends on the nature of how the
8 costs were identified for each particular element.

9 Q. But ultimately if parties had an incentive
10 to fight over the issue of allocation between
11 duration and setup, they would have filed different
12 testimony, done different discovery, and had a
13 different type of case; is that correct?

14 A. Only -- that might be true if you assume
15 that the allocation, as you call it, between setup
16 and duration is what drives the final rate. But I
17 don't believe that that is really what drives the
18 final rate or what drives the final cost.

19 What drives that is the more detailed
20 level of the cost study itself which identifies the
21 actual costs and assigns them on a causative basis
22 to whether they are being incurred on a per message

1 basis or whether they are being incurred on a per
2 minute basis.

3 Q. In the original TELRIC case, that
4 allocation was not relevant, was it?

5 A. As far as I know, there was no discussi on
6 or dispute over which costs were setup costs and
7 the level of those costs and which costs were
8 duration costs and the level of those costs.

9 I think the disputes that I'm aware of
10 in those dockets went more to the sort of the
11 overall factors that affected costs in general such
12 as depreciation, lives, or fill factors or things
13 that were of a more general nature and not would
14 generally get down to the level of individual cost
15 elements or sub elements.

16 Q. Now, in a case in which a party would
17 want -- let's assume for the moment that Ameritech
18 has to undertake a cost of service study to support
19 its bifurcated rate proposal.

20 In such a case, the parties would have a
21 strong incentive to investigate the allocation of
22 cost between setup and duration depending upon

1 their view of their own traffic on their system; is
2 that correct?

3 A. I would generally agree with that, yes.

4 Q. Turning your attention to Page 17 of
5 Exhibit 1, you state that if Ameritech opts into
6 the FCC capped rates, some carriers may decide to
7 maintain their existing rate; is that correct?

8 JUDGE GILBERT: What line are we on?

9 MR. MOORE: This is summary of the paragraph ,
10 the top paragraph.

11 MR. FRIEDMAN: We're on Exhibit 1.

12 MR. MOORE: Exhibit 1, Page 17. The question
13 is, What if Ameritech does at some point elect to
14 avail itself of the rates that the FCC order
15 established for ISP-bound traffic. I now see my
16 Page 16 is blank, so this is probably your Page 16.

17 JUDGE GILBERT: It is Page 16.

18 THE WITNESS: It is Page 16 on the copy that I
19 have.

20 MR. MOORE: Q We can get back to my question
21 then.

22 On the top paragraph, you discuss the

1 fact that if Ameritech opts into the FCC capped
2 rates, some carriers may decide to decline the
3 offer of those capped rates; is that correct.

4 A. Yes.

5 Q. And now many Ameritech agreements have
6 what's generally called a change of law provision;
7 is that correct?

8 MR. FRIEDMAN: Objection, foundation.

9 MR. MOORE: Q Are you familiar with Ameritech's
10 interconnection agreements.

11 A. In a -- yeah, I'm fairly familiar with
12 them. Obviously not familiar with every one in
13 great detail, but in general, yes.

14 Q. Are you familiar with what's considered to
15 be the change of law provision?

16 A. I'm familiar in a general way with the fact
17 there are such provisions in agreements and that
18 they do differ from agreement to agreement.

19 Q. And those provisions essentially allow a
20 party to require the other to begin negotiations to
21 modify the agreement in the event of some change of
22 law, whether it be statutory, regulatory, or

1 judicial; is that generally what they do?

2 A. That would be my general understanding of
3 the purpose of such a provision, yes.

4 Q. And is it my understanding that it's
5 Ameritech's position that some, if not all, of its
6 existing change of law provisions would be
7 inadequate to allow it to require parties to enter
8 into negotiations to change the agreement to
9 reflect the FCC rate caps?

10 A. There are certainly some agreements which
11 have change of law provisions that are more
12 stringent, perhaps, or that have different timing
13 kinds of provisions to them than others.

14 I'm not sure that I'm perhaps making a
15 connection that you aren't making here, but I'm not
16 sure how that is relevant or related to the earlier
17 question regarding my testimony.

18 Q. All right. Let's go back then. Let's
19 assume that Ameritech decides that it wishes to
20 elect to opt in to the FCC reciprocal compensation
21 order with its price caps and 3-to-1 ratio
22 provision.

1 What would its next step be with
2 existing carriers' agreements, first of all?

3 A. I believe -- it's only my belief because
4 ultimately it would be a legal counsel's decision
5 -- that we would send notification letters of some
6 sort to all of the carriers with whom we had such
7 agreements stating what we believe to be the legal
8 situation and requesting that we begin
9 negotiations; perhaps offering an amendment as a
10 starting point for those negotiations.

11 Q. By what right or support would carriers
12 refuse to negotiate with Ameritech when it sends it
13 that proposed language?

14 A. Well, I mean, there are two different
15 offers that are contemplated in the FCC's order or
16 two different types of amendment. There is first,
17 what I for shorthand purposes of think of as the
18 offered amendment, which is the qualification to
19 the amendment, a qualification that the FCC placed
20 on our ability to apply the rate caps to ISP-bound
21 traffic that we had to voluntarily offer to amend
22 other carriers' agreements to exchange 251(b)(5)

1 traffic at the capped rates.

2 That offer, as I would understand it, is
3 a voluntary offer and is not being proffered as a
4 requirement that a carrier accept it under a change
5 of law provision.

6 The second amendment is the amendment
7 that would impose the rate caps on ISP-bound
8 traffic as specified in the FCC order. And that
9 one would be noticed or, you know, characterized as
10 a request to invoke the change of law provisions in
11 the subject agreement, the agreement that we're
12 proposing to amend.

13 Q. So regardless of what a carrier's change of
14 law provision states, it is Ameritech's position
15 that it would not be able to require them to accept
16 the FCC price cap for 252(b)(5) traffic?

17 A. For 251(b)(5) traffic, yes.

18 Q. But depending upon the carrier's choice --
19 change of law provision, they may be able to be
20 required to modify the provisions regarding
21 reciprocal compensation for ISP traffic?

22 A. That is my understanding of the order as of

1 today.

2 Q. If the Commission orders Ameritech and XO
3 to exchange ISP traffic that is originating from a
4 local exchange at the same rate as Ameritech is
5 charging XO or both parties charge each other for
6 the exchange of 251(b)(5) traffic, is there any
7 need to identify and segregate ISP traffic in that
8 situation?

9 MR. FRIEDMAN: Can we hear the question back,
10 please

11 (Record read as requested.)

12 MR. FRIEDMAN: I'm going to state an objection.
13 The question is based on a false assumption. I
14 don't believe that the parties' various positions
15 call on the Commission to decide whether the
16 parties will compensate each other at the same rate
17 for ISP-bound traffic as for 251(b)(5) traffic. So
18 the question assumes that that question is somehow
19 before the Commission. I don't think it is.
20 Having said that -- well, I'll leave it at that.

21 MR. MOORE: You know, there 's probably a
22 preliminary question I can do that will save that

1 objection. I'll withdraw the question.

2 Q. XO has proposed that its 251(b)(5) traffic
3 be compensated at the rate in the existing Focal
4 agreement; is that correct?

5 A. That is my understanding, yes.

6 Q. That rate is the rate that is currently in
7 Ameritech's tariffs?

8 A. I believe that it is, yes.

9 Q. And XO has also requested that ISP traffic
10 be compensated at the rate in Ameritech's tariffs;
11 is that correct?

12 A. My understanding is that that is what XO
13 wants to happen. Whether I believe that the
14 documents that they've filed or the proposals that
15 they've made accomplish that end may be answered
16 differently.

17 Q. But XO has requested that ISP traffic be
18 compensated at the Commission approved rate which
19 was the Commission order in the TELRIC which is the
20 rate that Ameritech is charging in its tariffs; is
21 that correct?

22 A. I understand that to be what XO says it

1 wants, yes.

2 Q. So in that circumstance, or assuming it
3 gets both of those items, then ISP traffic and
4 252(b)(5) (sic) traffic would both be compensated
5 at the same rate; is that correct?

6 A. Yes.

7 Q. Now, in that circumstance, is there a need
8 for segregating ISP traffic from non-ISP traffic?

9 A. There is certainly no need to segregate it
10 for billing purposes. There's probably no need for
11 XO to segregate it. There may be some ancillary
12 needs for Ameritech and other ILECs who are still
13 subject to some degree of separations procedures
14 and other regulatory burdens to perhaps, at least,
15 make estimates of that traffic for tracking
16 purposes.

17 But I would agree that from a billing
18 standpoint, which is, I believe, the context of
19 which you're asking the question, it would not be
20 necessary.

21 Q. Ameritech will not require XO to segregate
22 its traffic; is that correct?

1 A. That's correct. And I believe that the
2 amendment that we offered does not require XO to do
3 that under that circumstance.

4 Q. Now, what sort of requirements would
5 Ameritech have that would require it to identify
6 it?

7 A. Well, Ameritech is subject to a number of
8 rules and regulations that require us to continue
9 to separately identify and track the interstate and
10 intrastate jurisdictional portions of our business
11 for accounting purposes.

12 So to the extent that this ISP-bound
13 traffic is being exchanged and compensated under
14 the auspices of an FCC order and is, therefore,
15 jurisdictionally interstate traffic, we do have at
16 least some requirement to reflect that reasonably
17 in the way that we account for our business.

18 I can't claim to be conversant in detail
19 of how we do separations today, but there's at
20 least a general requirement that we know the
21 difference between interstate and intrastate
22 business.

1 Q. You stated that you would make an estimate.
2 You would not be trying to measure each
3 and every call to determine whether it's going to
4 be ISP; is that correct?

5 A. How we do that would be to some extent up
6 to us. There are a lot of factors that potentially
7 go into how we would choose to make those estimates
8 or determinations, some of which might say that the
9 most efficient way for us to do that is to look at
10 the traffic on a relatively detailed basis and try
11 to understand as best we can what is ISP-bound
12 traffic and what is not.

13 Q. Could Ameritech use the 3-to-1 ratio
14 proposed by the FCC as its method of allocating
15 that traffic for purposes of its various separation
16 reports?

17 A. We certainly could do that if we felt that
18 that were a reasonable thing to do.

19 Q. Now, we just discussed local exchange
20 terminating with ISP.

21 What about 800, 1-plus dialing, any
22 other means of reaching an ISP other than a local

1 call? XO has proposed that those rates be
2 compensated at whatever rate the similar non-ISP
3 calls are being compensated; is that correct?

4 A. I believe that would be XO's position,
5 yeah.

6 Q. In the event that the parties do compensate
7 each other in that means, is there any reason to
8 segregate ISP traffic from non-ISP traffic?

9 A. Again, there's no reason to segregate it
10 for billing purposes, I think, for that kind of
11 traffic. I don't think -- I think we are both in
12 agreement that it is not even affected, per se, by
13 the FCC's order. Our only disagreement is only to
14 the extent to which the agreement between us should
15 explicitly reference that back.

16 Q. For example, 800 traffic shall be
17 compensated at X rate and 800 traffic includes
18 traffic over 800 terminating with ISPs?

19 A. Right.

20 Q. Getting back to the choice of law
21 provisions, has Ameritech entered into agreements
22 with some carriers in which both parties agree to

1 waive any choice of law provisions?

2 A. My understanding is yes, we have.

3 MR. FRIEDMAN: To make the record clear, may I
4 ask the reporter to read back the question. And I
5 think, Steve, that you may want to -- I think you
6 misspoke. You may want to -- I think the witness
7 in his mind corrected your testimony.

8 (Record read as requested.)

9 MR. FRIEDMAN: Do you mean -- I don't think you
10 meant choice of law because we also have choice of
11 law provisions in our contract.

12 MR. MOORE: Let me rephrase the question.

13 JUDGE GILBERT: Could I do, in the interest of
14 time, if the word "change" were inserted where the
15 word "choice" was used, would your answer be the
16 same?

17 THE WITNESS: Yes, it would.

18 MR. MOORE: Thank you.

19 Q. I'd like to turn your attention to your
20 Exhibit 3, your additional testimony dated August
21 17th. Page 7, line 13, the question is: Has
22 Ameritech Illinois elected to avail itself of the

1 rate caps specified in the FCC order.

2 The answer is: Not at this time,
3 though, of course, Ameritech will continue to
4 monitor and analyze developments in Illinois and
5 may determine that it would be prudent it do so at
6 some point in the future.

7 Now, what sort of developments would
8 Ameritech be monitoring and analyzing?

9 MR. FRIEDMAN: I'm going to object on the ground
10 that the information that the question seeks to
11 elicit is not relevant, can't lead to relevant
12 testimony, and inquires into highly confidential
13 matters.

14 The fact is that Ameritech Illinois may
15 decide from time to time to opt in to the FCC's
16 rates or not at its discretion, and I don't think
17 that Mr. Panfil's response to Dr. Zolnierrek's
18 testimony at this point opens the door to inquiry
19 as to how they might consider as it does that
20 because it can't help the Commission decide an
21 issue that's in front of the Commission.

22 MR. MOORE: All I'm asking is for a definition

1 of a word that's in his testimony. Monitor
2 developments; I want to know what kind of
3 developments.

4 JUDGE GILBERT: My feeling is, Mr. Friedman, the
5 witness has made this statement. If you're saying
6 that an inquiry into the statement will not produce
7 evidence that will be useful in the case, I'm not
8 sure why the statement is there at all. So I would
9 strike the statement or permit him to answer.

10 MR. FRIEDMAN: May I consult with the witness.

11 (Discussion off the record.)

12 MR. FRIEDMAN: Ameritech Illinois would withdraw
13 in light of that from its Exhibit 3 lines 13
14 through 17 so long as we can make a conforming
15 change in the next question. If you see the next
16 question, it kind of refers back to that. And the
17 change would be just to say: Does the fact that
18 Ameritech Illinois has not elected to avail itself
19 of the rate caps specified in the FCC offer merit
20 the importance Dr. Zolnierrek seems to assign to it.

21 JUDGE GILBERT: That's fine with me. My line
22 numbers are different from the line numbers you

1 just referenced. I have the question which begins
2 with the words "has Ameritech Illinois elected,"
3 starting on line 9 of Page 7.

4 Is that where you have it?

5 MR. FRIEDMAN: Some of us do.

6 JUDGE GILBERT: Okay.

7 MR. FRIEDMAN: Those of us who do, that will be
8 the program.

9 JUDGE GILBERT: So what will you strike then on
10 what I have is line 11 where the answer begins --
11 I'm assuming the entire answer or just after the
12 word "time"?

13 MR. FRIEDMAN: We would strike -- we're
14 perfectly happy to strike the entire question and
15 answer, though that may go beyond what the occasion
16 requires, and then amend the next question to read:
17 Does the fact that Ameritech Illinois has not
18 elected at this time to avail itself of the rate
19 caps specified in the FCC order merit the
20 importance that Dr. Zolnierrek seems to assign to
21 it.

22 JUDGE GILBERT: Okay. Before I write that in

1 here in my own copy, I'll need you to make a
2 decision as to what you're proposing to withdraw --

3 MR. MOORE: Before --

4 JUDGE GILBERT: -- with regard to the previous
5 question.

6 MR. MOORE: I object to withdrawing. I mean,
7 the witness has -- if we're in a regular hearing
8 and the witness makes a statement, you can't take
9 it back unless it meets an appropriate judicial
10 rationale for moving to strike the question. I
11 haven't heard an argument from Mr. Friedman why his
12 own witness's question and answer should be
13 stricken.

14 MR. FRIEDMAN: The reality is that in the
15 context of this arbitration, it seemed to make
16 sense in the testimony so no one had any doubt
17 about what was going on to be clear that Ameritech
18 Illinois has not at this time made that election.

19 Now, the witness then went on, no big
20 deal, and said, But we'll continue to monitor and
21 analyze developments and we'll do what we can do.

22 Now, you want to use that to leverage

1 into a discussion about now let's talk about what
2 the developments and are so forth, all of which is
3 irrelevant, okay.

4 Now, to deal with that, you know, my
5 objection will still stand. We can spend an hour
6 talking about what we're going to monitor, but it
7 doesn't elicit anything useful. So the objection
8 -- I made the objection, and kind of as an
9 alternative way of dealing with this disagreement,
10 we're willing to get rid of the piece of testimony
11 that one might suggest opens the door to your
12 question.

13 MR. MOORE: My response is the door is opened.

14 MR. FRIEDMAN: Then, you know, my response to
15 that would be to ask the judge to reconsider and to
16 grant -- to uphold the objection.

17 JUDGE GILBERT: Initially I think Mr. Moore
18 makes a good point that the testimony is already
19 here on the page, and do I apologize, Mr. Moore,
20 for essentially engaging in a private conversation
21 with Mr. Friedman before giving you an opportunity
22 to chime in as to what to do regarding the

1 objection.

2 That said, I'm going to overrule the
3 objection.

4 I will say, Mr. Panfil, that in
5 responding to the question regarding what you refer
6 to when you say Ameritech Illinois will have to
7 monitor and analyze, you are, of course, free to
8 invoke the attorney-client privilege to the extent
9 that the answer to that question would require you
10 to set forth advice given to you by counsel. So
11 you need not set forth the advice given to you by
12 counsel as you answer the question which asks you
13 to describe what things you would monitor and
14 analyze.

15 THE WITNESS: What I was referring to here was
16 simply the fact that at any point in time one has
17 to look at what agreements are in existence that
18 are, for example, even subject to the FCC's order
19 or certain provisions of the FCC's order. And that
20 because those conditions will change as time goes
21 on, the situation will change and that will change
22 the analysis as to whether invoking the caps as the

1 FCC order allows us to do is a reasonable thing to
2 do or not from our point of view.

3 MR. MOORE: Q Ameritech's decision will be
4 partly based on its evaluation of how it
5 financially affects Ameritech; is that correct.

6 A. Certainly it will, yes.

7 Q. And it's Ameritech's position it can make
8 this election at any time during the three years of
9 the FCC phase-in period; is that correct?

10 A. That is my understanding of what the FCC
11 order says, yes.

12 Q. Are you familiar at all with the duration
13 or holding times of XO relative to other carriers
14 in Illinois?

15 A. I'm not specifically at this time, no.

16 Q. Are there carriers in Illinois whose
17 business plan is to attract ISPs and therefore
18 derive significant incoming traffic which can be
19 charged reciprocal compensation?

20 A. My understanding would be that there
21 certainly have been in the past carriers for whom
22 that was a significant component of their business

1 plan. This is, again, my assumptional
2 understanding.

3 Q. Do you know if XO has traffic patterns that
4 indicate that it has such a business plan to
5 attract ISPs as customers?

6 A. I do not know that for certain as I sit
7 here.

8 MR. MOORE: I have no other questions.

9 JUDGE GILBERT: Staff?

10 CROSS-EXAMINATION

11 BY

12 MS. STEPHENSON:

13 Q. Mr. Panfil, this is mainly just for
14 clarification purposes.

15 Today you've stated that Ameritech
16 Illinois has not elected to avail itself to the
17 rate cap specified in the FCC order as of today?

18 A. That is correct.

19 Q. You've also stated that at any time they
20 might change their position?

21 A. That's my understanding.

22 Q. Okay. Counsel asked you a question -- and

1 this is not verbatim, so excuse me -- basically
2 saying, you know, how will carriers find out if
3 Ameritech opts into the FCC rate cap.

4 Do you recall when he asked you that?

5 A. Yes.

6 Q. And your answer was, you said you believe
7 that there would be -- it was your belief that
8 there would be a notification letter and then that
9 would entail a request to begin negotiation?

10 A. I believe that was my answer. In some
11 cases there would be a request for negotiation.

12 Q. This is just a belief of yours? Is this a
13 fact that this is how it will happen or...

14 A. That is my understanding to the best of my
15 knowledge as to how it will happen, but I'm not the
16 person who will do that or who will decide when
17 that happens. And I believe the exact form that it
18 must take will obviously be a legal determination
19 and not a determination made by me.

20 Q. So do you have any idea about the time
21 frame that the notification letter and all this
22 process will occur?

1 MR. FRIEDMAN: Objection, relevance.

2 JUDGE GILBERT: Where are we going with this?

3 MS. STEPHENSON: Just takes on the process how
4 the competitors will find out if they're going to
5 change -- if they are going to opt in to the FCC
6 rate cap, I think it's very relevant in what time
7 frame.

8 MR. FRIEDMAN: I may have misunderstood your
9 question. I thought you were asking -- I'll ask
10 for clarification. I thought you were asking does
11 the witness have any idea when Ameritech Illinois
12 might send out such a notice letter.

13 You're asking how much notice might such
14 a letter give?

15 MS. STEPHENSON: Correct. If they would make
16 the CLECs, you know -- just what time -- is it
17 going to be a week before this occurs, is it going
18 to be three months after it occurs? You know, just
19 a time frame.

20 MR. FRIEDMAN: I'll still object on relevance
21 grounds although I don't feel as keenly about it as
22 I did before.

1 JUDGE GILBERT: Relevance really is attenuated
2 here. This witness is saying it's ultimately not
3 his call anyway, so I'm not sure that we gain much
4 by having him answer the question. So unless you
5 can say more --

6 MS. STEPHENSON: The point is is that, you know,
7 the competitors are basically at the mercy -- you
8 know, is it going to be something that they turn
9 around and this happens. They're left with this
10 ambiguity when this is all going to occur, some
11 sort of time frame to put them on the same page and
12 give them some sort of a notice, and I think it is
13 very relevant.

14 JUDGE GILBERT: I think it's relevant to the
15 concern you're addressing, but I don't really see
16 its relevance to the question whether or not
17 certain provisions will be included in the
18 agreement between these two companies. So on that
19 basis, I'll sustain the objection.

20 MS. STEPHENSON: Nothing further.

21 JUDGE GILBERT: Okay.

22 MR. FRIEDMAN: Do you have questions?

1 JUDGE GILBERT: Yeah, is that okay? If you have
2 something procedural you want to interpose here, go
3 ahead.

4 MR. FRIEDMAN: I had simply forgotten whether
5 the sequence that you followed has you going now.

6 JUDGE GILBERT: Yes, it does.

7 EXAMINATION

8 BY

9 JUDGE GILBERT:

10 Q. I am trying to understand the company's
11 position, and I understand that you're not an
12 attorney. I think for both you and Mr. Kinkoph
13 it's true that you both ventured into attorneys'
14 waters. You both said the obligatory statement,
15 I'm not an attorney but, and then you went on to
16 interpret anyway.

17 Having done that, I have to ask, assume
18 with me for the moment that there is no such thing
19 as ISP traffic, there is no internet.

20 If a CLEC approaches Ameritech under
21 current law and requests to opt in to an existing
22 agreement under Section 252(i) including the

1 reciprocal compensation provisions of that
2 agreement, is Ameritech not obligated to provide
3 service pursuant to that agreement?

4 A. My understanding is we are with the
5 qualifications that exist within the law and
6 regulations related to Section 252(i) which have
7 some qualifications or exceptions associated with
8 it.

9 Q. I'm speaking in general and certainly
10 allowing for Ameritech to raise a specific concern
11 about a specific sort of sub provision of 252(i).

12 Speaking in the general terms that I
13 hope I've conveyed to you, you would agree with me
14 then that Ameritech would be obligated to provide
15 service pursuant to that agreement, accepting your
16 caveat?

17 A. Yeah, accepting the caveats and the fact
18 that we would enter into a new agreement kind of
19 including those same terms. Yeah, in general
20 functionally the answer is yes, effectively.

21 Q. Okay. Again your caveats are noted.

22 Now we add the internet back in. Your

1 understanding now is that that same CLEC approaches
2 you and because of the FCC's ruling on internet
3 traffic you are no longer obligated to provide
4 251(b) traffic pursuant to that agreement; is that
5 correct?

6 A. My understanding is yes, that that -- we
7 believe that given the level of change created by
8 that order that the other related provisions of the
9 portions of the agreements dealing with
10 intercarrier compensation are subject to
11 renegotiation.

12 Q. Is there something explicit in the FCC's
13 order, something explicit you can point to in
14 support of that position?

15 A. I guess that depends on the determination
16 of explicit. There is a footnote in that order
17 that talks about whether -- and I can't quote the
18 footnote per se -- but it talks about what in
19 general is referred to as whether portions of an
20 existing agreement have become stale or not;
21 whether they are, you know, required to be offered
22 under 252(i) because the world has changed. And I

1 think that is one of the things that creates the
2 background that says that these parts of the
3 agreement should be relooked at.

4 Q. Okay. Can you tell me now with the
5 assistance of your counsel, if you need, what
6 footnote you're referring to?

7 MR. FRIEDMAN: I will say in response to the
8 invitation that I don't have it at my fingertips.
9 I wonder if we can identify it over lunch or some
10 such thing.

11 JUDGE GILBERT: Sure can.

12 MR. FRIEDMAN: Actually, do you know where it
13 would be?

14 (Discussion off the record.)

15 MR. FRIEDMAN: Did you want us to keep looking
16 at this point? Actually, we could stop because I
17 thought you had indicated that after lunch was
18 okay.

19 JUDGE GILBERT: I thought I had stopped because
20 the witness appeared to be searching for the
21 answer. We can wait.

22 MR. FRIEDMAN: Probably the witness is referring

1 to footnote 155 which I think is a footnote to
2 paragraph 82, but I'm not so sure about that. It
3 uses the phrase "reasonable period of time."

4 JUDGE GILBERT: I see the footnote. It's not a
5 trick question. In fact, I see my role here as to
6 be exactly the opposite of trickster, to be
7 blatantly obvious in what I need to know.

8 Q. So in the event you want to amplify that
9 answer after lunch, that's fine with me too. I
10 think it's very essential to the resolution of the
11 case.

12 In addition to that footnote, is there
13 any other implicit or explicit support for the
14 position that the inability to opt directly into
15 the ISP traffic provision of the Focal contract
16 therefore permits Ameritech to decline to provide
17 service for the 251(b)(5) traffic?

18 A. Nothing else that I can think of.

19 Q. You were in the room when I asked
20 Mr. Kinkoph about that 3-to-1 ratio that's set out
21 in paragraph 79, I believe, of the FCC order, were
22 you not?

1 A. Yes.

2 Q. Do you agree with him that the 3-to-1 ratio
3 applies only in the event that Ameritech were to
4 elect the price caps that are set out in the FCC
5 order?

6 A. Yes. My understanding would be that that
7 provision comes into play only if the rate caps are
8 instituted.

9 Q. Would you look at Page 10 of your direct
10 testimony, what I hope will appear on Page 10 of
11 your copy of the testimony.

12 I'm looking at a question that begins
13 "you stated earlier that."

14 A. Yes, I have that on line 5, beginning on
15 line 5.

16 Q. Good. Sounds like we have the same lines.

17 If you look down to line 27 and if
18 you'll read the sentence that begins about in the
19 middle of line 27 and goes over onto Page 11?

20 A. It states that is exactly what has happened
21 under the current non cost based rate structure.
22 Competitive local service providers have focused

1 almost exclusively on a few niche customer groups
2 and services that provide them with the opportunity
3 to receive excessive compensation through arbitrage
4 of -- it should be an economic rate structure.

5 Q. Yes, that's what I'm referring to.

6 To the extent that you say competitive
7 local service providers, do you mean there to say
8 all local competitive local -- I'm sorry. Do you
9 mean to say all competitive local service providers
10 or some competitive local service providers? What
11 is the intention of the language there?

12 A. The intention of it would be to say some or
13 a significant number.

14 Q. If you would look at appendix reciprocal
15 compensation.

16 I have now separated this from the rest
17 of the agreement it was attached to, so I don't
18 recall what this exhibit or attachment number was.
19 I believe this is the Ameritech version of the
20 agreement was that attached to the response to the
21 petition.

22 MR. FRIEDMAN: It was.

1 JUDGE GILBERT: Q If you'd look at paragraph
2 5.7 which I have on Page 8 of the attachment.

3 A. Yes, I have it also.

4 Q. You refer there in the first line of that
5 section to local and ISP-bound traffic -- I
6 shouldn't say you refer. I should say Ameritech
7 has included that language in its proposed
8 agreement.

9 I'm assuming the intention there is to
10 reflect the FCC order which, as Mr. Friedman said,
11 defines ISP-bound traffic as nonlocal?

12 A. Yes, that is certainly one of the intents.

13 Q. Just give me a moment, bear with me.

14 If you would look at Page 13 of your
15 direct testimony, there you have a chart setting
16 forth existing local -- I'm sorry, reciprocal
17 compensation rates, correct?

18 A. Yes.

19 Q. I tried to do the math to derive what the
20 rate for a minute of use would be if the rates
21 proposed by Ameritech in this proceeding and
22 reflected in the appendix reciprocal compensation

1 were to apply. I don't know if I did my math
2 correctly.

3 Would it be so that the initial minute
4 -- the rate for the initial minute would probably
5 be higher and the rate for subsequent minutes lower
6 than under current rates?

7 A. I think that would be a fair general
8 statement, yes.

9 Q. Okay. I have in my notes that I composed
10 as I was reading all the testimony this conclusion,
11 and give me your reaction to it, if you would, that
12 both parties -- I'm excluding staff for the
13 moment -- that both parties are asserting that they
14 are not attempting to set ISP rates but are
15 attempting to establish reciprocal compensation
16 rates for 251(b)(5) traffic; and as a result of
17 that, ISP rates will follow because of the
18 mirroring requirement.

19 Would you agree that that is your
20 position, and would you agree that both parties are
21 essentially saying that?

22 A. I would agree that that's my position,

1 understanding that this mirroring that you're
2 talking about is what takes place during any time
3 period up to the point when the FCC rate caps may
4 be implemented.

5 I'm not sure that I can answer for
6 certain, if I understood the question, whether that
7 is XO's position or understanding here.

8 Q. Do you have a reason to believe it's not
9 their position?

10 A. No, I don't.

11 JUDGE GILBERT: All right.

12 DR. JAMES ZOLNIEREK: This is Jim Zolnierrek. We
13 have a fire alarm, so I have to step out. I
14 apologize.

15 JUDGE GILBERT: No, stand by, Jim. Don't be
16 afraid.

17 This is a good time to break then. That
18 will give everyone more time to plan for the next
19 round. We'll come back with redirect and then
20 recross, and hopefully I'll have no more questions
21 and Mr. Panfil can go.

22 (Recess taken.)

1 (Whereupon, Staff
2 Exhibit Nos. 1.0P, 1.0A-P,
3 1.0B-P, and 1.0C-P were
4 marked for identification.)

5 JUDGE GILBERT: We're going to go back on the
6 record.

7 We concluded the initial round of cross
8 and ALJ questions for Mr. Panfil. The witness is
9 still sworn.

10 Mr. Friedman, do you have redirect?

11 MR. FRIEDMAN: I do.

12 REDIRECT EXAMINATION

13 BY

14 MR. FRIEDMAN:

15 Q. Mr. Panfil, you recall testifying here
16 today about the extent to which you believe
17 Ameritech Illinois can or cannot compel carriers to
18 go along with the FCC rate cap program?

19 A. Yes.

20 Q. In that connection, I just want to make
21 sure we have this in kind of a crisp form.

22 Let's imagine that Ameritech Illinois

1 were to send out this notice about which there's
2 been some discussion notifying all carriers in the
3 state that Ameritech Illinois does hereby elect the
4 FCC rate caps for ISP-bound traffic and, in order
5 to do that, offers all carriers in the state to
6 exchange all 251(b)(5) traffic as well as all
7 ISP-bound traffic at those rates.

8 Now, as you understand it, a carrier can
9 or cannot decline Ameritech's offer?

10 A. My understanding would be that they can
11 decline the offer to exchange all traffic, both
12 251(b)(5) traffic and ISP-bound traffic at the cap
13 rates.

14 Q. What is the basis for your understanding
15 that a carrier can decline the offer?

16 A. Primarily a basis of the lack of anything
17 that I'm aware of that gives Ameritech or any other
18 company the ability to compel them to take that
19 offer.

20 Q. Is there anything about the way the FCC
21 wrote its ISP remand order or didn't write its ISP
22 remand order that forms the basis for your view?

1 A. Again, I suppose it's the latter. It's
2 that there's no indication in there that it can be
3 compelled, and I believe it's described as that we
4 are required to make an offer. In my view, an
5 offer means something that can be accepted or
6 turned down.

7 Q. Now, let's assume that a certain CLEC
8 declines this offer.

9 At least as you understand it, Ameritech
10 Illinois and that CLEC would thereafter exchange
11 251(b)(5) traffic at what rates?

12 A. At whatever rates are in the agreement
13 prior to us making the offer.

14 Q. Still assuming that same carrier declines
15 the offer, how would the parties compensate each
16 other thereafter for ISP-bound traffic?

17 A. That would depend on what that agreement
18 indicates. If it were an agreement dating prior to
19 the FCC's order, it would presumably at least in
20 the State of Illinois indicate that ISP-bound
21 traffic would be paid -- would be considered to be
22 local traffic and would be paid at 251(b)(5) rates

1 or the same rates as are in existence at that
2 point. If it were a post-FCC agreement, it might
3 say something differently.

4 Q. Assume that this carrier who has declined
5 Ameritech's offer has an agreement in place
6 pursuant to which the parties are exchanging
7 ISP-bound traffic at the local recip comp rates.
8 The carrier declines the offer, and yet Ameritech
9 has declared its intention to opt in to the FCC
10 rate caps.

11 Now can Ameritech Illinois, as you
12 understand it, compel that carrier to exchange
13 ISP-bound traffic at those FCC rate caps
14 notwithstanding its existing agreement to the
15 contrary?

16 A. My understanding would be that Ameritech
17 could do so given that there was a, quote, change
18 of law, unquote, kind of provision in there that
19 could be invoked to have the agreement amended to
20 impose the caps on compensation for ISP-bound
21 traffic.

22 Q. Why then -- if the contract does include

1 such a change of law provision, that is, a
2 provision that would allow Ameritech to compel this
3 hypothetical carrier to exchange ISP-bound traffic
4 at the FCC capped rates, why couldn't Ameritech
5 Illinois invoke that same change of law provision
6 to invoke that same carrier to exchange 251(b)(5)
7 rates at those FCC capped rates?

8 A. My understanding would be that we could not
9 do that because the FCC order did not change the
10 law or change the rules for 251(b)(5) traffic. It
11 only changed the law or the rules for ISP-bound
12 traffic.

13 Q. I want to turn to another subject.

14 Do you recall generally Mr. Moore asking
15 you questions about the cost docket that resulted
16 in Ameritech's current recip comp rates in that
17 docket?

18 A. I recall that line of question in general,
19 yes.

20 Q. I'd like to refer you to schedule 1 to your
21 direct testimony, which I believe is found at the
22 very end of the testimony as the only schedule

1 thereto.

2 Are you there?

3 A. Yes.

4 Q. Let me just lay some groundwork by talking
5 about the way this works. Let's focus in on
6 Illinois end office. This is going to be a
7 calculation for end office switching rate under
8 that column that says Illinois end office; is that
9 correct?

10 A. Yes.

11 Q. And where it says "original analysis" up at
12 the top, that means what?

13 A. That is a reproduction, if you will, of the
14 sort of the last step of the cost study in which
15 the component costs of the end office switching
16 elements were melded together into a single average
17 per minute rate.

18 Q. All right. And the per minute rate that
19 that calculation yields for end office switching is
20 what?

21 A. .003746.

22 Q. And we see that in the little rectangle

1 that says "composite rate per minute"?

2 A. Yes.

3 Q. That number is arrived at with the last
4 calculation is the addition of some shared and
5 common costs, correct?

6 A. Correct.

7 Q. But then going back one more step, you've
8 got a sum, namely, .002606.

9 That's the sum of what numbers?

10 A. That's the sum of the line labeled
11 setup -- pardon me, "setup per minute" and the line
12 labeled "duration cost per minute."

13 Q. Now, when Mr. Moore was asking you
14 questions about the cost docket, what point did you
15 understand him to be trying to establish with
16 respect to that setup per minute number, the
17 duration cost per minute number, and the composite
18 rate per minute number?

19 A. What I understood his point or direction to
20 be was to indicate that the process of coming up
21 with the bottom line rate was a zero sum gain; that
22 any objections to the whether cost or setup costs

1 or duration costs or any objection to the cost
2 study wouldn't necessarily change the bottom line,
3 that they would just sort of move things around
4 without a result, a change to the bottom line
5 composite rate.

6 Q. So that, for example, the .003746 per
7 minute might be accurate notwithstanding some
8 inaccuracy or some, what I'll call misallocation,
9 as between setup and duration costs, the two
10 numbers that are added in order to eventually get
11 to that composite rate?

12 A. Yes.

13 Q. That was -- now, do you agree with that
14 proposition; that is, that it may be that the
15 composite rate from the point of view of people
16 participating in that cost docket was accurate to
17 their satisfaction despite the fact that either
18 that the setup per minute charge and the duration
19 per minute charge might have been off so long as
20 they were off by offsetting amounts?

21 A. I wouldn't agree that that's likely to
22 happen in the real world, that the -- any -- it's

1 not a zero sum gain. The bottom line costs are a
2 composite of individual costs which have no direct
3 bearing on each other, or the fact that one is a
4 setup cost and one is a duration cost does not mean
5 that they are tied to one another in any fashion.

6 The only way that you can analyze the
7 bottom line number and determine if it is
8 reasonable is to look at the components, whether
9 they be duration components or setup component s,
10 and look at each one on an individual basis and
11 determine whether you believe it to be properly
12 calculated or not properly calculated and then that
13 each individual element would drive through to the
14 bottom line.

15 But it wouldn't be the case that it
16 would simply be a matter of moving one average lump
17 of costs from setup to duration. It would -- any
18 change to the assumptions would change the bottom
19 line result, and the only way that you can verify
20 the bottom line result is to look at the individual
21 pieces.

22 MR. FRIEDMAN: That's all the questions on

1 redirect.

2 JUDGE GILBERT: Recross, XO.

3 RECROSS EXAMINATION

4 BY

5 MR. MOORE:

6 Q. Real briefly, still staying with Panfil
7 schedule 1, let's assume for a moment for whatever
8 policy reason someone believes that the SS7 charge
9 of .00104 is more appropriately split between setup
10 and duration and some of that ought to be in the
11 duration.

12 If you move, say, half of that over to
13 duration, wouldn't that still result in the bottom
14 line being the same?

15 A. If you are doing that on a purely arbitrary
16 basis, then, yes, you could create a situation
17 where the bottom line is the same.

18 But in order to realistically and/or in
19 any kind of a justifiable manner challenge whether
20 SS7 costs are per minute costs or per message costs
21 or whether some of each, you would actually have to
22 go back into the calculations that make up that

1 cost and determine which of those costs are, in
2 fact, setup costs and which are, in fact, duration
3 costs.

4 And the likelihood is that if it's
5 estimated incorrectly the way that it was initially
6 done, the result of making the change would be a
7 different result and not the same result allocated
8 over some arbitrary number of minutes.

9 Q. Let me give you my hypothetical.

10 Hypothetically, a witness determines
11 that, yes, indeed SS7 cost is .00104, but I believe
12 for X reason that only one half of that should be
13 allocated to setup and the other half ought to be
14 on a per minute basis.

15 If they make that allocation and
16 put -- I'm sorry, SS7 on setup and 000052 on
17 duration, wouldn't the bottom line be the same?

18 A. It certainly wouldn't if you took -- just
19 got 000052 and moved it from setup to duration.
20 The result mathematically there would be different
21 because you would be actually reclassifying and
22 changing cost.

1 If you were to assume that some portion
2 of that cost for it to remain the same, you would
3 have to be arbitrarily removing a portion of that
4 cost and arbitrarily spreading it over a certain
5 number of minutes, say 3 and a half minutes, in
6 order to allocate it again arbitrarily to the
7 duration portion of the cost rather than to the
8 setup portion of the cost.

9 But, again, doing it in that way, it is
10 entirely arbitrary to come up with a reason for
11 taking some of that cost and moving it from the
12 setup to duration.

13 You would realistically have to delve
14 into the actual cost itself and not simply pluck
15 off a chunk of it and decide that for no apparent
16 reason that it belongs in duration rather than
17 setup.

18 Q. Every cost of service recommendation
19 contains judgments based on either policy
20 engineering that allocate cost among various
21 elements; is that correct?

22 A. I'm not sure that I would -- with something

1 like policy as a factor. I think they are
2 allocated in cost studies based on economic factors
3 based on the best judgment as to what
4 functionality, what usage causes that cost to
5 incur.

6 Q. Various witnesses disagree on those
7 allocations. That's why we have very long cases
8 for cost of service studies; is that right?

9 A. They certainly sometimes disagree on those
10 kinds of things. Though, again, more often the
11 disagreements tend to be on rather larger picture
12 issues such as overall depreciation rates or fill
13 factors or economic lives, that kind of thing.

14 MR. MOORE: I have no questions.

15 JUDGE GILBERT: Staff?

16 MS. STEPHENSON: We have nothing.

17 JUDGE GILBERT: Thank you, Mr. Panfil.

18 MR. FRIEDMAN: Quick follow-up on that line?

19 JUDGE GILBERT: We've had redirect and recross,
20 no, just as I cut Mr. Moore off from following up
21 on a line of questioning that you had embarked.

22 Thank you, sir.

1 That takes us to Mr. Zolnierек. Are you
2 on the line?
3 DR. JAMES ZOLNIERЕК: Yes, I am.
4 JUDGE GILBERT: You survived the fire drill.
5 DR. JAMES ZOLNIERЕК: I survived.
6 JUDGE GILBERT: You folks ready? You want to
7 talk to him at all first?
8 MS. STEPHENSON: We're ready to go. We might
9 ask for a brief two minutes after he's done being
10 cross-examined.
11 JUDGE GILBERT: Before redirect?
12 MS. STEPHENSON: Right.
13 JUDGE GILBERT: Do you need any time now?
14 MS. STEPHENSON: No.
15 JUDGE GILBERT: Are you able to hear your
16 counsel? Could you hear the things they said.
17 DR. JAMES ZOLNIERЕК: I've been able to hear
18 clearly.
19
20
21
22

1 (Witness sworn.)

2 DR. JAMES ZOLNIEREK,

3 called as a witness herein, having been first duly

4 sworn, was examined and testified via telephone

5 as follows:

6 DIRECT EXAMINATION

7 BY

8 MS. KELLY:

9 Q. Dr. Zolnierrek, can you please state your
10 name and business address for the record, please.

11 A. James Zolnierrek, 527 East Capitol Avenue,
12 Springfield, Illinois 62701.

13 Q. And, Dr. Zolnierrek, do you have in front of
14 you copies of ICC Staff Exhibit 1.0 consisting of
15 34 pages?

16 A. Yes, I do.

17 Q. With three attachments, attachment A, B,
18 and C?

19 A. Yes, I do.

20 Q. And is this your revised public version?

21 A. Yes, it is.

22 Q. And do you have any changes that you need

1 to make to this?

2 A. Yes, there are two changes, and I'm not
3 sure if the page numbers here coincide with
4 everyone in the room.

5 On my Page 9, line 163 -- there's a
6 question that begins on Page 8 and the answer
7 begins on Page 9 in my version. And the answer
8 begins, No, currently the Ameritech Focal
9 arbitrated interconnection agreement, dot, dot,
10 dot. The "no" should be stricken.

11 Q. Okay. And the next one is?

12 A. In footnote 27 on my Page 21, are you
13 there?

14 Q. Yes.

15 A. The footnote reads, This issue is addressed
16 below. It should read, This issue is addressed
17 above.

18 JUDGE GILBERT: Let's stop for a second. I'm
19 confused because I thought the revised version
20 already has the changes.

21 MS. KELLY: Yeah, they do. I'm sorry. We're
22 just pointing out the changes that were made.

1 JUDGE GILBERT: Tell me the first one again.

2 MS. KELLY: The first one was on Page 9, line

3 163. In the other version there was "no" right

4 before "currently," and that was stricken. And

5 then the second one is on Page 21, footnote 27.

6 JUDGE GILBERT: I have that one.

7 MS. KELLY: Q Is that all.

8 A. In the public version.

9 Q. Was this prepared under your direction?

10 A. Yes, it was.

11 Q. If I were to ask you the same questions

12 found in these documents, would your answers be the

13 same here today?

14 A. Yes, they would.

15 Q. Dr. Zolnierrek, do you have in front of you

16 Staff Exhibit 1.0P?

17 A. Yes, I do.

18 Q. That's your verified statement consisting

19 of 34 pages?

20 A. Yes, it is.

21 Q. And with that includes three attachments A,

22 B, and C?

1 A. That is correct.

2 Q. This is your revised public version --

3 sorry -- your revised proprietary version?

4 A. Yes, it is.

5 Q. And do you have any changes that you'd like

6 to make in this document?

7 A. The changes are identical to the changes in

8 the public version, if that speeds things up.

9 Q. Same pages?

10 A. Page number, same footnote.

11 Q. Okay. Were these documents prepared by you

12 or under your direction?

13 A. Yes, they were.

14 Q. And if I were to ask you the same exact

15 questions found in these documents, would you be

16 able to answer them the same way here today?

17 A. Yes, I would.

18 MS. KELLY: At this time I'd like to enter into

19 the record Staff Exhibit 1.0 consisting of -- with

20 three attachments and staff Exhibit 1.0P consisting

21 of three attachments as well.

22 JUDGE GILBERT: I'm seeing the copy that you

1 provided for me today, an unofficial copy of the
2 revised public and proprietary testimonies, do not
3 contain the attachments. I don't think I'm worried
4 about that unless there's some change to the
5 attachments from the previous filing.

6 MS. KELLY: No, there aren't, but I can give you
7 them right now.

8 JUDGE GILBERT: No, that's okay, as long as they
9 haven't been changed. Okay.

10 Objection to the admission of any or all
11 of these?

12 MR. FRIEDMAN: Ameritech Illinois's only
13 objection is the one that it stated earlier this
14 morning, namely, to the admission of Page 2, line
15 45 starting with the word "first" through Page 3,
16 line 51 ending with the word "commitment;" and then
17 on Page 16, line 326 through Page 18, line 360,
18 again, for the reasons set forth this morning.

19 MR. MOORE: I would restate the arguments I made
20 this morning.

21 MS. STEPHENSON: I would restate the arguments
22 that I made this morning and just add that

1 Dr. Zolnierrek's testimony in its entirety is very
2 relevant to this proceeding.

3 Ameritech asserts that requiring it to
4 determine whether it wishes to adopt the reciprocal
5 compensation rate caps established by the FCC in
6 its ISP-bound traffic order is not within the scope
7 of this proceeding.

8 Yet, let's just take for example that as
9 we're all sitting in the room today unbeknownst to
10 any of us Ameritech is out there and they have
11 decided to start, you know, adopting the rate caps.

12 And if all that occurs, there are no
13 contingency plans built into either of the
14 interconnection agreements to deal with this, which
15 would, in turn, basically allow Ameritech to
16 nullify the contract. And basically this whole
17 interconnection agreement would have to start
18 renegotiating or begin the process over.

19 And I think, you know, in support of our
20 position, I'm going to point to Ameritech's own
21 witness's -- I'm sorry. I believe this is his
22 direct testimony, which would be Exhibit 1. It's

1 line 7 and 8 of my testimony -- the copy that I
2 received. It could be a little bit different.

3 But it begins with the paragraph at line
4 3: Ideally, I believe the provisions of this
5 agreement between XO and Ameritech Illinois should
6 fully reflect all aspects of the compensation plan
7 set forth in the FCC's ISP compensation remand
8 order including terms and conditions related to the
9 optimal rate cap so the agreement would not need to
10 be amended in order to accommodate the application
11 of the rate caps on the ISP-bound traffic should
12 Ameritech Illinois declare its intent to impose the
13 caps and satisfy a prerequisite established by the
14 FCC, and it goes on.

15 So for those reasons, in addition to the
16 reasons that were asserted by counsel for XO this
17 morning as well as ourselves, we believe
18 Mr. Zolnierrek's testimony is, as I said, in its
19 entirety very relevant to this proceeding.

20 JUDGE GILBERT: Would you repeat the citation to
21 the text you just read?

22 THE WITNESS: Judge Gilbert, may I just

1 interject just as a point of clarification? I may
2 be able to help.

3 JUDGE GILBERT: Let her answer my question.
4 Then you can do that.

5 MS. STEPHENSON: You know, I apologize. It's
6 Exhibit 3. I apologize. It was the additional
7 round of testimony where Mr. Panfil responded to
8 Mr. Zolnierrek. I'm sorry.

9 JUDGE GILBERT: Tell me the page again.

10 MS. STEPHENSON: It began at the bottom of Page
11 7. The paragraph that I was citing was on
12 Page 8. It's the first full paragraph, line 3,
13 beginning with "ideally," and I don't know if
14 that's where everybody else is.

15 JUDGE GILBERT: Dr. Zolnierrek, was there
16 anything else you were going to say other than to
17 clarify that?

18 THE WITNESS: No, I was just going to say the
19 cite.

20 JUDGE GILBERT: Mr. Friedman, anything else you
21 want to say?

22 MR. FRIEDMAN: Just a brief reply, and that is

1 that staff's argument missed the point entirely.
2 The position we are asserting in our objection to
3 the testimony is not that it won't be a
4 tremendously important event for all of us if
5 Ameritech declares its intentions in this regard.
6 It would have impact.

7 For that matter, it really isn't even
8 our position that it wouldn't be a good thing for
9 Ameritech Illinois to declare itself. And I'll
10 even go a step further and say our argument isn't
11 even based on the proposition that the Commission
12 might not want to do such a thing.

13 The argument, again, is first that the
14 Commission's authority in any arbitration under
15 Section 252, which is what this is, is only to
16 decide the issues set forth in the petition and the
17 arbitration, and that does not include this because
18 there was no hint of a suggestion in the petition
19 or the response that the Commission require
20 Ameritech Illinois to declare itself.

21 Second, that no matter what the
22 pleadings said, the Commission's authority as an

1 arbitrator is limited to doing those things that
2 Congress authorized it do in Section 252 of the
3 Act; and all of those things are to resolve
4 disagreements between parties about their rights
5 and obligations under Section 251, of which this is
6 not one.

7 And third and finally, apart from all
8 that, it's a substantive matter. Given the FCC's
9 order, we think the Commission doesn't have
10 authority to issue the order that staff requests
11 anyway. But that is, I'll grant you, maybe a
12 tougher point. But the first two I don't see -- I
13 have not heard an answer to.

14 JUDGE GILBERT: Okay. I'm going to hold in
15 abeyance a ruling until the witness has testified.
16 Other than that, are there objections? Okay.

17 Let me not even rule then on the motion
18 for admission of the testimony until we have
19 completed cross.

20 Mr. Friedman, I assume you're up first.

21 MR. FRIEDMAN: Okay.

22

1 CROSS - EXAMINATION

2 BY

3 MR. FRIEDMAN:

4 Q. Are you most accustomed to being called
5 Dr. Zolnierek, which most of us have been doing
6 most of the time?

7 A. Whatever you prefer. It doesn't matter to
8 me.

9 Q. Okay. I'll follow your lawyers' lead then.

10 Dr. Zolnierek, everyone else who's
11 testified today has expressed his opinion on
12 whether a competing carrier is allowed to decline
13 an Ameritech Illinois offer to exchange all
14 251(b)(5) traffic and all ISP-bound traffic at the
15 FCC capped rates.

16 Have you heard that testimony?

17 A. Yes, I have.

18 Q. What is your view on this matter?

19 A. It is my reading of the FCC order -- which
20 I have to caveat I'm not a lawyer -- that the FCC
21 was largely silent on whether the offer had to be
22 accepted or not. There's no explicit language that

1 said yes, the offer has to be accepted, or no.

2 And given that the traffic covered by
3 that offer is 251(b)(5) traffic, which I'm still
4 under the assumption that this Commission has some
5 jurisdiction over, then I believe this Commission
6 could say -- could rule on that particular type of
7 traffic that that offer would have to be accepted.

8 Q. Would have to be accepted, you say?

9 A. That's right, if the Commission rules as
10 such.

11 Q. Let me probe that a little further, okay.
12 Let's imagine that Ameritech Illinois has an
13 interconnection agreement today with carrier XYZ
14 and that under that agreement the parties are
15 exchanging 251(b)(5) traffic at the rates that
16 appear in the agreement, we'll say, but which also
17 happen to be the rates in Ameritech Illinois's
18 tariff, and let's further assume that Ameritech
19 Illinois offers -- makes this offer to carrier ABC.

20 A. Ameritech elects the caps?

21 Q. Ameritech elects the caps and so says to
22 carrier ABC, We hereby make you an offer to

1 exchange all 251(b)(5) traffic as well as all
2 ISP-bound traffic at the FCC's rate caps and no
3 longer to exchange 251(b)(5) traffic at the rates
4 in our agreement.

5 Now, to make it a little tougher, let me
6 also ask you to assume that this agreement does not
7 have a change of law provision in it at all.

8 Now, we make the offer. In step one,
9 can carrier ABC say, No, we decline, we're going to
10 stick with exchanging 251(b)(5) traffic at the
11 rates that are in our agreement?

12 A. Without a change of law provision?

13 Q. Yeah.

14 A. Yes, I believe that is true.

15 Q. Let's say there is a change of law
16 provision, and let's assume that essentially what
17 the provision says is that if the FCC issues an
18 order of a sort that this ISP remand order falls
19 into that either party can demand that the other
20 renegotiate their agreement in accordance with that
21 order, okay.

22 You with me?

1 A. Yes.

2 Q. Now, again, Ameritech Illinois makes the
3 offer.

4 Can the CLEC ABC at step one decline the
5 offer?

6 A. If this Commission were evaluating the
7 implications for 251(b)(5) traffic and the
8 ramifications of that offer, I think this
9 Commission could order that carrier to accept that
10 rate. I don't think it's inconsistent with the
11 FCC's rule.

12 Q. You're getting a little bit ahead of me.
13 Maybe that's okay.

14 But we make the offer. Is it legal for
15 carrier ABC, as you understand it under the FCC's
16 order, to say, No, thank you?

17 We're not even at the Commission yet.

18 A. I think they can reject it and Ameritech
19 can raise a dispute.

20 Q. So we would then say, Okay, we hereby
21 invoke our change of law provision and we demand
22 that you renegotiate the intercarrier compensation

1 provisions for 251(b)(5) traffic. And assume that
2 the carrier said, No, we don't have to do that.
3 There's nothing in the FCC's order that says we
4 have to do that.

5 We might then, I take it, according to
6 your view wind up in the Illinois Commerce
7 Commission?

8 A. That is my view.

9 Q. With this dispute?

10 A. That's correct.

11 Q. And we would take the position, Commission,
12 you should make carrier ABC exchange traffic with
13 us at the FCC capped rates?

14 A. With the qualification that we're talking
15 about 251(b)(5) traffic?

16 Q. Correct.

17 A. Yes.

18 Q. What is our argument? What do we say to
19 the Commission, you should do this because what?

20 A. I think it's consistent with your argument
21 that this Commission is able to set rates for
22 251(b)(5) traffic.

1 You've proposed different rates, which
2 indicates to me that your belief is that this
3 Commission still has jurisdiction over those rates.
4 And under the circumstances you specified, I would
5 say the Commission would be setting rates for
6 251(b)(5) traffic that are consistent with the
7 FCC's ruling.

8 Q. Now, the carrier ABC says, Well, we've got
9 an agreement already with rates in it.

10 A. And the change of law provision and the FCC
11 issued new rules.

12 Q. We're saying in effect to the Illinois
13 Commerce Commission, The FCC says we're entitled as
14 a matter of law to have you make this carrier
15 exchange 251(b)(5) traffic with us at the FCC
16 capped rates?

17 A. You're welcome to petition the Commission.
18 The Commission can reject that.

19 Q. Thank you.

20 Now, your testimony in this matter is
21 based in part, is it not, on this understanding of
22 yours that Ameritech Illinois can compel all the

1 carriers in the state to exchange 251(b)(5) traffic
2 at the FCC capped rates, right?

3 A. Perhaps I should clarify here, I didn't say
4 that Ameritech can compel. I said Ameritech could
5 petition this Commission. This Commission, I
6 believe under the FCC rules, has the ability to
7 compel the carriers to exchange at that particular
8 rate, the capped rate.

9 Q. You're not expressing an opinion one way or
10 the other on whether in this scenario the
11 Commission should do so?

12 A. If you ask my economic interpretation, I
13 think it's consistent with the FCC's order and I
14 think they should do so.

15 Q. But you don't think they have to?

16 A. I don't think there's anything in the FCC
17 rules that prescribes whether they have to or don't
18 have to.

19 Q. Now, there are parts of your testimony,
20 that is Staff Exhibit 1.0, that are based on or
21 that reflect this assumption of yours that
22 Ameritech Illinois with the Commission's assistance

1 could bring it to pass that it exchanges 251(b)(5)
2 traffic at the FCC capped rates, correct?

3 A. There is a reference to it in one of my
4 footnotes.

5 Q. Let me tell you what I have in mind.

6 Would you turn to Page 4 of your
7 testimony starting at line 71.

8 Just first to see that we're at the same
9 place, I'm referring to a sentence that starts with
10 the word "first."

11 A. Yes, I have that same sentence.

12 Q. Now, the context here is you're postulating
13 up at the beginning of this paragraph that
14 Ameritech elects the FCC's rate caps, right?

15 A. That's right.

16 Q. This is that scenario.

17 And then in discussing what would then
18 happen, you've got the sentence that says, starting
19 on line 71, First rates, terms, and conditions for
20 reciprocal compensation of traffic subject to the
21 reciprocal compensation provisions of Section
22 251(b)(5) of the 1996 Act in this interconnection

1 agreement will be set at the rate caps prescribed
2 by the FCC's ISP-bound traffic order.

3 Now, that would not be true, would it,
4 if we made the offer, XO declined the offer, and
5 then, for example, the Commission did not grant our
6 petition to force XO to exchange 251(b)(5) traffic
7 at the FCC capped rates?

8 A. I'm sorry, can you repeat the question.

9 Q. Let me see if I can do a little better.
10 Let's go step by step.

11 That sentence you have there that says,
12 First rates, terms, and so forth, that sentence may
13 be right and it may be wrong; isn't that correct?

14 A. It's my recommendation. You could argue
15 that my recommendation is right or wrong.

16 Q. You're recommending then that in this very
17 proceeding the Illinois Commerce Commission compel
18 XO to exchange 251(b)(5) traffic with Ameritech at
19 the FCC capped rates if Ameritech opts for the
20 caps?

21 A. That's my recommendation.

22 Q. Did you hear me ask Mr. Kinkoph, XO's

1 witness, this morning what XO would do if Ameritech
2 Illinois made this offer to XO?

3 A. I'm not sure I got the entire exchange.

4 Q. Well, I think the record will show that I
5 asked Mr. Kinkoph to assume that he had the right
6 to decline the offer and if he had the right to
7 decline, you know, what response would XO make if
8 Ameritech Illinois made the offer, and he said he
9 did not know.

10 And then just to refresh your memory, I
11 said, I suppose that's because you hadn't thought
12 about it before because you were assuming you had
13 to accept, and he said, That's right.

14 Is that ringing a bell?

15 A. Yes.

16 Q. Now, taking Mr. Kinkoph at his word that
17 XO, at least as of now, does not know how it would
18 even respond to an Ameritech Illinois offer, how on
19 earth could -- within the confines of this
20 arbitration could the Commission take you up on
21 your recommendation; by which I mean, I guess,
22 require Ameritech Illinois to declare itself,

1 Illinois makes an offer to XO, XO may accept or
2 decline -- we don't know which -- and if it
3 declines, then I take it your recommendation is
4 that right within this very arbitration the
5 Commission as part of its arbitration decision
6 says, XO, you've got to accept.

7 You think there's time in this
8 proceeding for all that to happen?

9 A. I'm thinking.

10 Yes.

11 Q. You do, okay.

12 Could you turn to Page 20 of your
13 testimony. Starting at line 402, you have a
14 question starting there?

15 A. Does the FCC's rule?

16 Q. Right.

17 If you would just read to yourself that
18 question and the first paragraph of your answer, I
19 want to ask you a question about it. Just tell me
20 when you're set, if you would.

21 A. Yes, I have read it.

22 Q. Am I correct in my understanding that in

1 your view so long as Ameritech Illinois does not
2 elect the FCC caps, the Commission has jurisdiction
3 to consider Ameritech's bifurcated rate propos al
4 even though it's your view that it should not do
5 so?

6 A. If Ameritech does not elect the caps?

7 Q. If Ameritech does not elect the caps, then
8 the Illinois Commerce Commission does have
9 jurisdiction to consider Ameritech Illinois's
10 bifurcated rate proposal, correct?

11 A. Yes, I do.

12 Q. Does staff have a position on whether the
13 Commission has authority in this arbitration to
14 take you up on your recommendation that the
15 Commission order Ameritech to declare itself with
16 respect to the FCC caps?

17 Long question. Did you get did?

18 A. Can you repeat it, please.

19 Q. You have made a recommendation in your
20 testimony that the Commission direct Ameritech
21 Illinois in this arbitration to declare whether it
22 is going to opt in to, I think the words you used,

1 the FCC rate caps, correct?

2 A. Yes.

3 Q. Does staff have a position on whether the
4 Commission has authority to do that in this
5 arbitration?

6 A. I cannot speak for counsel. I can only
7 speak for nonlegal staff and say I do believe the
8 Commission has that ability.

9 Q. What's the basis for your view,
10 understanding that you're speaking for staff and
11 not necessarily for counsel?

12 A. It gets to the heart of my recommendation.
13 Any absence of an election or knowing if Ameritech
14 has made an election, which presumably could have
15 happened today without my knowledge, things would
16 completely change. And to make a recommendation, I
17 had to consider both if Ameritech did or did not
18 elect.

19 And not knowing when Ameritech's going
20 to elect I believe puts a significant impact on the
21 business plan of XO who is at issue in this
22 arbitration.

1 Q. What -- I'm sorry, were you done?

2 A. No, I was not done.

3 Q. Please go ahead.

4 A. So based on my economic analysis, I think
5 in order for the Commission to approve the terms
6 and conditions related to 251(b)(5), I think it's
7 within their right to request and actually require
8 that Ameritech make a decision.

9 Q. Does your view take into account at all
10 what Section 252 of the 1996 Act says about the
11 scope of the Commission's authority in an
12 arbitration or no?

13 A. In what respect?

14 Q. You've just expressed your view about the
15 Commission's authority to do certain things in this
16 arbitration, right?

17 A. Yes.

18 Q. Now all I'm asking you is in forming that
19 view, did you take into account what Section 252
20 says about the scope of an arbitrator's authority?

21 MS. STEPHENSON: We would ask for a
22 clarification. Why don't you ask if he's familiar,

1 lay a little foundation.

2 MR. FRIEDMAN: I'm happy with the question.

3 MS. STEPHENSON: We object to the question.

4 He's already stated his position is staff. He has

5 stated he will not give his legal interpretation.

6 So if you want to put a clause on that and first

7 lay a foundation and ask him his familiarity with

8 that section, that's fine.

9 MR. FRIEDMAN: The question was whether the

10 witness had taken a certain thing into account in

11 forming his opinion. It's a yes or no question.

12 It doesn't ask for him to give a legal opinion

13 about anything.

14 JUDGE GILBERT: He can answer that.

15 THE WITNESS: Yes.

16 MR. FRIEDMAN: Q You did.

17 A. Yes.

18 Q. Do you think there's something in Section

19 252 of the Act, as you understand it, that, indeed,

20 does authorize this Commission to take you up on

21 your recommendation?

22 A. Yes, I believe so.

1 Q. What is that?

2 A. If you look at 252, Section C, standards
3 for arbitration.

4 Q. Right.

5 A. Part 1 says: Ensure that such resolution
6 and conditions meet the requirements of Section 251
7 including the regulations prescribed by the
8 Commission pursuant to Section 251.

9 Q. That's a reference to resolution of what?

10 A. I'm sorry?

11 Q. Resolution of what is it referring to as
12 you understand it?

13 A. Resolution of the issues set forth in the
14 petition and the arbitration in general.

15 Q. It says, Set forth in the petition and the
16 response, doesn't it?

17 I'll withdraw the question. We can move
18 on.

19 A. Are you reading from something?

20 Q. We can move on. I'll withdraw the
21 question.

22 How exactly would Ameritech Illinois's

1 election in your view affect XO's business plans?

2 A. Let's presume -- and I don't know XO's
3 business plan. Let's presume they are a provider
4 of a service that is not ISP oriented and they
5 receive a lot of inbound traffic from Ameritech and
6 not much traffic going in the other direction but
7 it's not ISP traffic as defined by the FCC.

8 If Ameritech were to elect the caps, the
9 revenue they would receive from Ameritech would
10 change potentially dramatically with the reduction
11 in rates envisioned by the FCC's caps. Under such
12 circumstances, it would be likely that XO would
13 have to change their rate structure to their
14 customers.

15 Obviously, Ameritech might run into the
16 same circumstances; but given that XO may have a
17 much larger percentage of traffic that's
18 intercarrier as far as 251(b)(5) traffic, it may
19 significantly affect XO and it may be a change in
20 the rate structure that XO has to make that
21 Ameritech may not because a lot of Ameritech's
22 traffic is within the Ameritech system.

1 Q. So you're suggesting that XO should be
2 allowed to continue arbitraging reciprocal
3 compensation rates?

4 A. Not at all. I'm suggesting that XO has an
5 entitlement to know what the game is going to be.
6 If the rates are going to change on them, at some
7 point in the future they should know that.

8 The uncertainty adds to their business
9 plan and, I think the uncertainty -- I can point to
10 you points in the FCC order where the FCC was
11 concerned about the business plans of competitive
12 carriers. That's why they didn't slash cut to bill
13 -- it's my understanding that that's why they
14 didn't slash cut to bill and keep. I think these
15 are real concerns not only to the Commission but
16 the FCC.

17 Q. Could you turn to Page 10 of your
18 testimony, please.

19 Starting right at the top of the page,
20 line 180, you've got a sentence that says: In the
21 event that the companies elect to measure ISP-bound
22 traffic directly, and then you go on.

1 You see where I'm pointing to?

2 A. Yes.

3 Q. How do the companies make that decision --
4 let me rephrase.

5 Does one or the other company get to
6 decide that unilaterally, or do the companies
7 decide it together as you understand it?

8 A. I don't think in reading the FCC 's order
9 there were no specific guidelines for how that
10 election would be made, whether one particular
11 carrier could measure -- create -- impose
12 reconfiguration of a network to measure this
13 traffic.

14 In fact, as I indicated in my testimony,
15 I don't believe it can be a unilateral decision. I
16 believe the FCC's proxy for measurement of ISP
17 traffic was an indication that the FCC didn't
18 envision this type of a reconfiguration to measure
19 this traffic directly.

20 I think the FCC allowed a rebuttable
21 presumption, but I think they put the burden on the
22 carriers to come up with a methodology that

1 wouldn't impose costs on, for example, XO to
2 measure such traffic specifically if they did not
3 want to in the elective process.

4 Q. Let me direct your attention to another
5 sentence in your testimony mostly because I want to
6 use your language in some questions I'm going to
7 follow up with.

8 At Page 30 starting on line 625, you say
9 that staff does not believe that Ameritech's
10 bifurcated solution is an unambiguous movement
11 toward rates more reflective of costs, correct?

12 A. That's right.

13 Q. I assume we agree that having rates that
14 are more reflective of costs is a good thing and
15 should be done to the extent that the costs of
16 implementing such a change don't outweigh the
17 benefit, correct?

18 A. Absolutely.

19 Q. I'm sorry?

20 A. Absolutely. I think that I indicated that
21 in my testimony.

22 Q. Do you have Eric Panfil's direct testimony

1 handy? That was Ameritech Exhibit 1. It's the one
2 with the schedule at the back.

3 A. Yes, I do.

4 Q. Would you turn to Panfil schedule 1,
5 please. Are you there?

6 A. Hold on. Okay. I'm on schedule 1.

7 Q. Assume just for purposes of this question
8 that the -- well, you see the composite rate per
9 minute for Illinois end office, the .003746?

10 A. Yes, I do.

11 Q. I want you to assume for just a moment that
12 that rate is what I will call accurate; that is,
13 that it was the ideal rate at the time it was
14 determined, okay. And I want you also to -- and it
15 was correct and unchallengeable. And I want you to
16 make the same assumption about all the pieces that
17 went into it; that is, the .006617 was the exactly
18 right setup cost per minute, duration related cost.
19 All the numbers are correct, okay?

20 A. Okay.

21 Q. Can you assume that for just a moment?

22 A. I'll be willing to make that assumption.

1 Q. Now, if you make that assumption, then it
2 is clearly true, it is not, that Ameritech's
3 bifurcated solution would be, indeed, an
4 unambiguous movement towards rates more reflective
5 of costs?

6 A. You have to clarify the question. What
7 time frame are we talking about?

8 Q. Let's do like this: Let's assume for the
9 sake of -- for the moment that these numbers are
10 accurate as of today.

11 A. Okay.

12 Q. Then would you agree with me that
13 Ameritech's bifurcated solution under that
14 assumption would be, in fact, an unambiguous step
15 in the direction of rates more reflective of costs?

16 A. If you make the assumption that all the
17 costs are correct for today and the traffic
18 patterns are correct for today and, in fact,
19 there's a question about how -- where average
20 minutes would come from, if we're just talking
21 about 251(b)(5) traffic, so you'd have to take that
22 into consideration. Making a whole host of

1 assumptions, yes.

2 Q. Now, you suggest in your testimony that for
3 various reasons some of these underlying pieces may
4 have been imprecise at the time they were first put
5 before the Commission, and separate and apart from
6 that for other reasons may be imprecise today,
7 correct?

8 A. I don't know that they are incorrect or
9 correct, but there is evidence that they may be
10 incorrect.

11 Q. Evidence that they may be --

12 A. For the current situation.

13 Q. Okay. Assume that all of the numbers are
14 off by 1 percent, okay, and that they're off by 1
15 percent in random directions.

16 A. Okay.

17 Q. Wouldn't you agree with me that it is
18 highly probable that bifurcation would be a step in
19 the right direction under that assumption?

20 A. I need to step back. Are we assuming that
21 all the rates are 1 percent off from what they
22 actually are today and the minutes of use for

1 today?

2 Q. Yes. In other words, I'm asking you to
3 take the assumption that you made before and just
4 tweak it in that one respect; instead of all the
5 numbers being exactly right, they're all 1 percent
6 off.

7 A. I guess I'm not prepared to evaluate how
8 far the numbers have to be off for it to be worse
9 than the status quo. I'd have to look into that a
10 lot more than just to speculate on -- if you go 1
11 percent, what's 2 percent? Where's the line?

12 Q. I'm not going to ask you a whole bunch of
13 questions. I want to start with 1 percent. In
14 fact, I'm not even going to ask you 2 percent. I
15 chose 1 percent as a small percentage on purpose
16 because I suspect would you say, well, if it's just
17 1 percent, bifurcation is still a good idea.

18 A. That's an assumption you're willing to make
19 and probably one I would be willing to make but not
20 necessarily. I would like to evaluate rather than
21 just speculate.

22 Q. Would it be possible to evaluate

1 mathematically the degree of error that these
2 figures could have in them such that bifurcation --
3 what I'll call a break point, okay. Would it be
4 possible mathematically to determine an amount of
5 error that could be -- these numbers could tolerate
6 such that bifurcation is still a step in the right
7 direction?

8 A. It would be a nontrivial exercise.

9 Q. It could be done?

10 A. Not perfectly.

11 Q. Did you make any attempt to do it at all in
12 forming your opinion?

13 A. I guess I compared the numbers with other
14 numbers attempting to measure the same thing, and
15 there was significant difference in my opinion.
16 And while I'm not ruling out that they could be the
17 correct numbers that you're proposing, I've also
18 said because there's a significant difference,
19 there is reason to believe that they're not
20 appropriate.

21 Q. And the comparisons you're talking about
22 are the comparisons that appear in your testimony,

1 correct?

2 A. That's right.

3 MR. FRIEDMAN: No further questions. Thank you,

4 Dr. Zolnierек.

5 THE WITNESS: Thank you.

6 MR. MOORE: I didn't have any before. I have

7 one real quick line.

8 MR. FRIEDMAN: Well...

9 JUDGE GILBERT: Well, they haven't had a shot

10 yet.

11 MR. FRIEDMAN: I was kidding. I have no

12 objection.

13 JUDGE GILBERT: Okay. Let's take a very brief

14 break. I need to leave for a moment. I'll be

15 right back.

16 (Recess taken.)

17 JUDGE GILBERT: We'll go back on the record.

18 Mr. Moore for cross-examination.

19 CROSS-EXAMINATION

20 BY

21 MR. MOORE:

22 Q. Dr. Zolnierек, this is Steve Moore for XO.

1 A. Good afternoon.

2 Q. Now, in response to one of Mr. Friedman's
3 questions, you indicated that if Ameritech decides
4 not to opt in to the FCC rate cap then the Illinois
5 Commerce Commission has jurisdiction to consider
6 its bifurcated rate proposal; is that correct?

7 A. That's correct.

8 Q. Now, you're aware that in this proceeding
9 XO has exercised its Section 252(i) right to opt in
10 to the Focal agreement for the reciprocal
11 compensation rate for 252(b)(5) -- 251(b)(5)
12 traffic; is that right?

13 A. Yes, I am well aware of that.

14 Q. Now, in that circumstance, does XO's right
15 to opt in to 251(b)(5) traffic eliminate the
16 ability of the Commission to assign to XO and
17 Ameritech the bifurcated rate proposal for
18 251(b)(5) traffic?

19 A. Can you repeat the question.

20 Q. Let me try again.

21 Given the fact that this is an opt -in
22 proceeding for 251(b)(5) traffic, does the

1 Commission's jurisdiction to impose the bifurcated
2 rate proposal include jurisdiction over the rates
3 that XO is attempting to opt into for 251(b)(5)
4 traffic?

5 A. I believe so --

6 MR. FRIEDMAN: I have to make an objection.

7 JUDGE GILBERT: Dr. Zolnierек, hold on because
8 there's an objection to the question.

9 MR. FRIEDMAN: And I apologize because I liked
10 the form better the first time. The objection is
11 to the form of the question described this as an
12 opt-in proceeding. This is not an opt-in
13 proceeding. There are such things as opt-in
14 proceedings. This by XO's choice is a Section
15 252(b) arbitration in which, as you said, XO is
16 asserting that it can exercise certain 252(i)
17 rights.

18 MR. MOORE: Let me rephrase the question then.

19 Q. Given the fact that this proceeding began
20 when XO exercised its 252(i) rights and one of the
21 issues before the Commission is the rate for
22 251(b)(5) traffic, does the Commission have

1 jurisdiction to disallow XO's ability to opt in to
2 the Focal rate for 251(b)(5) traffic?

3 A. I do not believe so, but I believe the
4 Focal agreement -- it's my understanding the Focal
5 agreement has a provision that allows the
6 Commission to change rates for reciprocal
7 compensation for 251(b)(5) traffic.

8 So in the event the Commission does
9 change those rates, I would assume that XO by
10 adopting the Focal agreement would be subject to
11 that same change.

12 Q. The Focal agreement has not changed -- to
13 put another way, the Focal agreement that as of the
14 date that XO opted into the Focal agreement, the
15 rates being charged were those contained in
16 Ameritech's tariffs for -- that have been approved
17 in the TELRIC order; is that correct?

18 A. Yes.

19 Q. And those are the rates that XO has
20 requested that it be allowed to opt into for
21 251(b)(5) traffic; is that correct?

22 A. Yes.

1 Q. And it's your position that the Commission
2 can disallow that request and instead impose on XO
3 the bifurcated rate structure for 251(b)(5)
4 traffic?

5 A. It's my understanding that the Commission
6 can rule that an alternative set of rates are
7 appropriate.

8 Q. Under what authority can the Commission
9 make that decision?

10 A. The same authority, I believe, that they
11 made the decision in the Focal case.

12 Q. Turning to another topic, is it your
13 opinion that the bifurcated rate proposal has been
14 fully developed in this case in terms of cost
15 support and whatever other evidentiary showing the
16 staff would expect to see?

17 MR. FRIEDMAN: Objection, scope; goes beyond the
18 scope of -- I'm sorry. Is this just their turn, or
19 is this XO following up on the questions I asked?
20 Maybe I've lost track.

21 JUDGE GILBERT: It's cross-examination of the
22 witness.

1 MR. FRIEDMAN: Withdraw the objection.

2 THE WITNESS: I think I indicated within my
3 verified statement my reservation regarding the
4 adoption immediately of the existing TELRIC rates
5 with the bifurcation proposed by Ameritech.

6 MR. MOORE: I have no other questions.

7 JUDGE GILBERT: Can I hear the witness's last
8 answer, please.

9 (Record read as requested.)

10 EXAMINATION

11 BY

12 JUDGE GILBERT:

13 Q. Dr. Zolnierrek, would you look at Page 15 of
14 your testimony. If you look at line 303 down
15 toward the bottom of the page and the sentence that
16 that is part of?

17 A. "As explained above," that part of that
18 sentence?

19 Q. Yes.

20 A. Yes.

21 Q. You use a subjunctive word there, may, may
22 mirror those in the Ameritech Focal arbitrated

1 interconnection agreement.

2 Why do you use the conditional term?

3 Isn't that what is required?

4 A. As I indicated before, I think the
5 Commission has the ability to go in and change
6 251(b)(5) traffic rates.

7 I suppose, perhaps, the "may" would be
8 removed if the qualifier was in there that the
9 rates in the Focal agreement that are subject to
10 change, perhaps that should be the caveat. In that
11 case, they would mirror the rates because if the
12 Commission changed the recip comp structure for
13 251(b)(5), then those rates would change in the
14 Focal agreement, is my understanding, and therefore
15 they would be mirrored here. So not necessarily a
16 particular rate.

17 Q. But the mirroring must occur, must it not?

18 A. If the Commission agrees with XO that they
19 can opt in to all the provisions except for the
20 ISP-bound traffic rates.

21 Q. What is the provision in the Focal
22 agreement that would take into account a -- was it

1 a rate change that you said for reciprocal
2 compensation?

3 A. Yes. I can cite the arbitration decision
4 if that would be appropriate.

5 Q. Sure.

6 A. Give me a moment. I need to find the
7 proper cite.

8 Q. That's all right.

9 A. This is a quote from the Commission's
10 conclusion in the Focal arbitration. It's Docket
11 00-0027, Page 12, and the last paragraph in the
12 middle of that paragraph: However, the company
13 should take note that the Commission may subject to
14 this reciprocal compensation rate to --

15 THE REPORTER: I can't hear the witness.

16 THE WITNESS: -- based on the ultimate
17 conclusion reached in the reciprocal compensation
18 proceeding.

19 And now as I read that, I think I need
20 to consider my answer for a moment.

21 JUDGE GILBERT: Q You want to do that now.

22 A. If you could give me a moment.

1 Q. Sure.

2 A. Because I know that relates to ISP-bound
3 traffic, and we're talking about local traffic.

4 In the cite you referred me to in my
5 testimony...

6 Q. Yes.

7 A. I was referring to ISP-bound traffic in
8 that particular passage, and this refers to
9 ISP-bound traffic. But in that case I don't
10 think -- on further consideration I don't think
11 that cite is relevant because the issue is
12 251(b)(5) traffic.

13 The Commission not through that order
14 has the ability to revise rates for 251(b)(5)
15 traffic and that would -- that would under no
16 election of rate caps by Ameritech under the FCC
17 rules create a change for ISP-bound traffic.

18 But the cite I don't think is relevant
19 in that case because the Commission can't act
20 specifically in order to -- under the FCC's order
21 to reconfigure ISP-bound rates. So I apologize.
22 That's an improper cite.

1 Q. What you've just referred to as an improper
2 cite was the oral citation you provided, correct?

3 You weren't referring to anything in
4 your testimony; you were referring to what you said
5 previously, correct?

6 A. That the Commission could change rates for
7 251(b)(5) traffic?

8 Q. Yes.

9 A. Yes, I believe they can do that. That
10 would -- with no election of caps, that would
11 change the ISP-bound rates according to the FCC's
12 rules in my opinion.

13 Q. Okay. I've lost you then. I thought you
14 were retracting the position, and now you seem to
15 be reasserting it. Maybe I'm confused.

16 A. It's just the relevance of the citation.
17 The citation was made when the Commission was
18 considering what should be an ISP-bound traffic
19 rate.

20 I think that that issue here is that the
21 Commission no longer has that problem on its hands.
22 The FCC has, I think, clearly said, It's not your

1 decision. But the FCC said, If Ameritech does not
2 elect the caps, whatever you decide for 251(b)(5)
3 traffic would be applicable to ISP-bound traffic.

4 So if we -- if this Commission changes
5 the rates for 251(b)(5) traffic, by the FCC's
6 rules, in my opinion, the rate for ISP-bound
7 traffic will change. So it's sort of just the
8 authority under which the change occurs and where
9 the change is directed.

10 Q. Okay. And did you say earlier that there
11 was something in the Focal agreement that would
12 permit the Commission to change the rates for
13 251(b)(5) traffic?

14 A. I believe so, but I can check on that cite
15 if you're willing to wait. I don't have a specific
16 cite off the top of my head.

17 To the extent it refers to the tariff, I
18 believe the Commission can change the tariff, as
19 was indicated below -- or previously in an answer I
20 said.

21 The Commission has the authority to
22 decide this issue. I think they could decide, as

1 Ameritech has indicated, they could file a tariff,
2 Commission could accept that tariff, and I believe
3 that would change the rates in the Focal agreement
4 for 251(b)(5) and if XO were to mirror the Focal
5 agreement, XO's rate.

6 MR. FRIEDMAN: Is a hint permissible?

7 JUDGE GILBERT: Please.

8 MR. FRIEDMAN: Dr. Zolnierrek, maybe you're
9 referring to a certain footnote on the first page
10 of the pricing schedule in the Focal agreement.

11 JUDGE GILBERT: We can go beyond hint because I
12 ultimately have to write a good order. What are
13 you referring to?

14 MR. FRIEDMAN: Truthfully, I'm a little bit
15 confused so I'm not sure if this is, in fact, what
16 he has in mind. But there is a footnote 1 on the
17 first page of the pricing schedule which is fairly
18 long but in general it says that some of the rates
19 and prices in this Focal pricing schedule were
20 established by the Commission pursuant to its -- in
21 its TELRIC proceedings and that if the Commission
22 or some other tribunal changes such rates, the

1 parties agree to substitute the TELRIC order rates
2 with such new or modified rates.

3 THE WITNESS: PS1, footnote 1?

4 MR. FRIEDMAN: Yeah.

5 THE WITNESS: I have that in front of me.

6 JUDGE GILBERT: Okay.

7 Q. Is that what you were referring to or --

8 A. That's consistent.

9 Q. That's consistent with your reference?

10 A. With what I believe, yes.

11 Q. Would you repeat for me as specifically and
12 clearly as you can where you see the Commission's
13 authority to consider your recommendation regarding
14 rate caps either in this arbitration proceeding or
15 in general?

16 A. I guess I need a clarification.

17 Considering rate caps you mean -- I mean, I
18 consider this Commission to have the authority to
19 determine the rates for 251(b)(5) traffic as long
20 as they're consistent with the FCC rules.

21 I don't think the FCC stripped us
22 completely of the authority to determine those

1 rates. Although, if Ameritech invokes the caps,
2 certainly those 251(b)(5) rates will have to be
3 consistent with the FCC's rule on that; where, in
4 fact, Ameritech would be required to at least
5 offer -- and as indicated before, there's some
6 dispute as to whether the other -- the CLEC party
7 would have to accept, but Ameritech would be
8 required to offer the capped rates.

9 So there's no question that the FCC is
10 -- their jurisdiction has spilled over into
11 251(b)(5). They're imposing further constraints
12 than existed prior if Ameritech elects the caps.
13 So I don't think that strips the Commission of the
14 authority to operate under those caps.

15 I don't think anything has changed. I
16 think the Commission all along has had the ability
17 to determine rates for that traffic. I just think
18 there's now posed an additional constraint that the
19 Commission has to adhere to.

20 Q. I asked a bad question, so you answered
21 something I wasn't asking. That's my fault,
22 although it was an instructive answer.

1 I was talking about your recommendation
2 that Ameritech be required to make an election
3 regarding the rate caps.

4 A. Right.

5 Q. Could you restate what you believe the
6 authority would be that would enable the Commission
7 to consider that recommendation in an arbitration
8 context or to consider it at all?

9 A. I think when we're considering the issues
10 involved in the arbitration, I think this
11 Commission has to be aware of consistency between
12 the proposals and the rules and regulations of the
13 FCC and this Commission.

14 And I think with that in mind, I think
15 this Commission could find that Ameritech's
16 implication and, I think, statement in many cases
17 that they don't have to make a choice, they can
18 make a choice whenever they feel like it, I think
19 this Commission could find that inconsistent with
20 the FCC's rules.

21 And I don't think that's outside the
22 bounds of this Commission's role in settling

1 arbitration disputes particularly given the fact
2 that at issue is 251(b)(5) traffic. And if you
3 make the argument that they can't -- the Commission
4 has no authority to make that judgment on 251(b)(5)
5 traffic, why is the recip comp -- why is any recip
6 comp even in this arbitration.

7 Q. Is your recommendation that Ameritech be
8 required to make a choice or that Ameritech be
9 required to make the particular choice of electing
10 the FCC's rate caps?

11 A. I think Ameritech should be given the
12 opportunity to make a choice either to not elect or
13 to elect. But I don't think they should be given
14 the ability to, for example, elect tomorrow --
15 given that the FCC's order is silent, it's
16 conceivable that the -- Ameritech could elect
17 during periods of high ISP-bound traffic flows to
18 elect the caps, and then when the traffic flows
19 were lower during off-peak periods to revoke back
20 to no caps. You know, nothing prohibits that, I
21 don't think, in the FCC's orders, but I don't think
22 it's consistent with the FCC's intention.

1 Q. If the recommendation were solely that
2 Ameritech make a choice and the choice Ameritech
3 makes is to not use the FCC's rate caps, are you
4 suggesting there would be some sort of time limit
5 before Ameritech could change its mind?

6 A. I think the Commission should actually give
7 them a time limit to make a decision and not allow
8 them to change their mind because I believe it
9 would be inconsistent with -- first, it's
10 anti-competitive, so I think the Commission has
11 some authority to evaluate the arbitration in that
12 sense. But I also think it's inconsistent with the
13 intent of the FCC's rules, although not --
14 admittedly not explicitly outlined.

15 Q. If they were required to make the choice
16 and they made the choice not to elect the rate
17 caps, they could never then in the future choose
18 the rate caps?

19 A. The FCC has indicated this is a three-year
20 plan, and at the end of the three-year plan the FCC
21 at least is contemplating a move to doing that,
22 they may or may not. But all carriers are on

1 notice that that could be the final result in three
2 years.

3 Q. Okay. During that three-year provisional
4 period or transitional period, I should say, if
5 Ameritech had already chosen under your proposal to
6 decline the rate caps, they would not be able to
7 change their mind?

8 A. Subject to any change in the FCC rules,
9 remands, things like that. That's my opinion.

10 JUDGE GILBERT: Redirect?

11 MS. STEPHENSON: Could we just have a moment to
12 confer?

13 JUDGE GILBERT: Do you want to get him on
14 another line someplace?

15 (Recess taken.)

16 JUDGE GILBERT: Okay. We're back on the record
17 for redirect.

18 MS. STEPHENSON: Staff has no redirect.

19 JUDGE GILBERT: So there's no recross. That's
20 it.

21 MR. ROWLAND: Could we clarify something?

22 MR. MOORE: Quickly clarify the questions

1 responding to your -- answers responding to your
2 questions. I want to clarify two aspects of that
3 just to make sure I understood his responses. It
4 was a little confusing on one of them.

5 JUDGE GILBERT: I'm going to hate myself for
6 doing this --

7 MR. FRIEDMAN: -- full disclosure.

8 MS. STEPHENSON: Stick to clarifications and not
9 additional questions.

10 JUDGE GILBERT: Yes, and also in fairness I will
11 have to let everyone else then clarify.

12 MR. MOORE: Hopefully these will be neutral
13 enough that no one will want to.

14 JUDGE GILBERT: We'll see if something like that
15 is possible. Go ahead.

16 RECROSS - EXAMINATION

17 BY

18 MR. MOORE:

19 Q. Dr. Zolnierrek, I just want to make sure I
20 understand your testimony regarding the
21 Commission's order in Docket 00-0027.

22 You, after several questions from the

1 Hearing Examiner, determined that there is nothing
2 in the language you cited on Page 12 that affects
3 the Commission's jurisdiction over ISP rates in
4 this case; is that correct?

5 A. And consistent with my testimony, I
6 indicated that in that arbitration the issue is the
7 ISP-bound rates and not the 251(b) or non-ISP-bound
8 local rates; although, I hesitate to use the word
9 "local" because the FCC doesn't like it anymore.

10 Q. Let me try again.

11 Your testimony is that this order does
12 not impact the Commission's authority over
13 252 -- 251(b)(5) traffic; is that correct?

14 A. The arbitration -- the Focal arbitration
15 didn't address 251(b)(5) traffic, I do not believe .

16 Q. To the extent that it affected ISP traffic,
17 the Commission's jurisdiction over that is subject
18 to whatever one's view is of the FCC order?

19 A. That's right.

20 Q. And now turning your attention to the
21 footnote 1 in the pricing schedule of the Focal
22 agreement, it's your opinion there that this

1 footnote gives the Commission jurisdiction in this
2 particular docket to impose upon XO a different
3 pricing schedule for 251(b)(5) traffic than what's
4 shown in the pricing agreement?

5 A. To be clear on that, it was my
6 understanding that the Commission could change
7 251(b)(5) rates and that those rates in the Focal
8 agreement would then change, and I believe this
9 provision allows that.

10 The mechanism by where that happens may
11 need to be through a tariff change or approval of
12 new TELRIC rates, and subsequently I think it's
13 again a tariff change.

14 Q. All right. So it would be a change
15 applicable to all carriers and not just XO?

16 A. No, I don't believe so. Because it's my
17 understanding that some carriers do have agreements
18 that don't rely on the tariff rates.

19 Q. It would be a change to tariff rates
20 available to those who use tariff rates?

21 A. And where their contract provisions allow
22 for changes in that, similar to what I think

1 footnote 1 is doing here.

2 MR. MOORE: I have no other questions.

3 JUDGE GILBERT: Ameritech?

4 RECROSS - EXAMINATION

5 BY

6 MR. FRIEDMAN:

7 Q. You mentioned in response to a question by
8 Judge Gilbert this idea of Ameritech Illinois going
9 into and out of the FCC rate caps as volumes of
10 ISP-bound traffic fluctuate from time to time; do
11 you recall that?

12 A. Yes.

13 Q. When you said that, that was the first
14 mention of that concept in this proceeding, was it
15 not?

16 A. I think I indicated in my testimony that
17 Ameritech made it clear that they could elect the
18 caps. I think I provide numerous cites to
19 references where Ameritech said they could elect
20 caps at any moment.

21 Q. Let me try that one again.

22 Before you said what you said a few

1 minutes ago, I believe that there was no reference
2 anywhere in this arbitration in anyone's testimony
3 or elsewhere about a notion of Ameritech going into
4 and out of and into and out of the FCC rate caps;
5 isn't that correct?

6 A. It was just left open by Ameritech that
7 they could invoke the caps at their discretion. So
8 that specific example, I don't -- I believe it's
9 subsumed under the general.

10 Q. You have taken Ameritech Illinois's
11 position to mean that in its view it has the right
12 to go in and out at its whim; is that right?
13 That's how you've understood Ameritech Illinois's
14 position in this arbitration?

15 A. I've taken Ameritech's position to be that
16 they can elect the caps anytime they choose.

17 Q. It's important that we be clear on this.

18 Have you understood it to be Ameritech
19 Illinois's position that it can, for example, elect
20 to go under the FCC rate caps and then sometime
21 thereafter elect to come out from under those caps
22 and then again elect to go under the caps at will

1 and so on and so forth? Has that been your
2 understanding of Ameritech Illinois's position?

3 A. I guess I don't have an understanding of
4 that particular position because Ameritech has
5 indicated that the FCC has no prohibition on them
6 invoking the caps at any moment.

7 So absent a similar prohibition on
8 flipping back and forth, I would assume that it's
9 possible that Ameritech could take that position,
10 although there's no indication whether or not
11 Ameritech adopts position; it's subsumed by the
12 larger Ameritech position that they basically can
13 do what they want as far as election.

14 Q. Isn't it your understanding, though, that
15 if Ameritech elected the rate caps that that
16 election would wind up being reflected in
17 Ameritech's interconnection agreements or
18 amendments to those agreements and that thereafter
19 Ameritech Illinois's ability to undue its choice
20 would be constrained by those agreements?

21 A. That's exactly my concern here is that the
22 absence of an election would be reflected in this

1 agreement, and there's no provision for the
2 election so I don't see what the difference would
3 be if you elected and then went back on it.

4 Q. All right. One last follow-up. I'm going
5 to see if you'll throw me a bone on this one,
6 Dr. Zolnierek.

7 You've discussed your understanding
8 about CLECs being able or not being able to decline
9 Ameritech's offer to exchange 251(b)(5) traffic at
10 the FCC capped rates and about what might happen
11 thereafter.

12 A. Correct.

13 Q. Can you at least see a reasonable basis for
14 an Ameritech Illinois concern that if it were to
15 make this offer to the world some CLECs might
16 accept and some might decline, and those who
17 decline might be able to succeed or make their
18 declination stick; do you at least see a basis for
19 that concern that's reasonable?

20 A. I think I addressed that in my
21 recommendation. I recommended that the Commission
22 in the event Ameritech elected the caps impose it

1 on all other carriers. Again, that's my
2 recommendation.

3 The ability of those carriers to go and
4 reject the offer is, again, not explicitly spelled
5 out in the FCC's order so, yes, I would admit it's
6 a concern.

7 Q. I just didn't hear the last few words. Did
8 you say yes I would --

9 A. Yes, I would admit it's a concern.

10 MR. FRIEDMAN: No further questions. Thank you.

11 JUDGE GILBERT: Staff?

12 MS. STEPHENSON: Just one clarification.

13 REDIRECT EXAMINATION

14 BY

15 MS. STEPHENSON:

16 Q. Dr. Zolnierrek, when counsel was just asking
17 you about one of your responses to the Judge's
18 questions, and I believe it's when you gave the
19 example of Ameritech could adopt the rate caps and
20 then not have the rate caps, then adopt them, do
21 you remember that?

22 A. Yes.

1 Q. Was that just a scenario of one thing that
2 they might do, not specifically Ameritech's
3 position?

4 A. Absolutely. Ameritech may have no
5 intention of doing that. They may have no
6 intention of electing the caps. They simply -- it
7 appears to me they reserved the right to do
8 whatever they feel they want to do, and it's in
9 their -- depending on whatever criteria they use to
10 evaluate that position.

11 I just think that's inconsistent with
12 the intent of the FCC and with this Commission as
13 far as its rules and regulations regarding meeting
14 the FCC requirements and the competitive...

15 Q. I just wanted to clarify that that was just
16 one scenario; it's an example you were
17 giving --

18 A. -- may not be considering that scenario at
19 all. That's perfectly plausible.

20 MS. STEPHENSON: Thank you. That's all.

21 JUDGE GILBERT: Okay. That's it. Thank you,
22 Dr. Zolnierrek.

1 THE WITNESS: Thank you.

2 JUDGE GILBERT: That's it for testimony and
3 exhibits, I assume. All right. That leaves me
4 with the motions.

5 Okay. First on the objection to the
6 testimony of Dr. Zolnierек and the objection to the
7 testimony of Mr. Kinkoph responding to the
8 testimony of Dr. Zolnierек, I'm not going to take
9 the objection with the case. I'm going to overrule
10 the objection.

11 I remain very skeptical that
12 Dr. Zolnierек's recommendation is something that
13 can be considered in an arbitration and is
14 something that the Commission can order in any
15 event.

16 That said, I view an objection to the
17 presence of testimony in the record as something I
18 reserve for matters for which I cannot find a
19 basis, even allowing for some creative lawyering.

20 In this case, I feel that I don't -- I
21 don't know of a basis for rejecting out of hand the
22 possibility that Dr. Zolnierек's recommendation can

1 be considered within an arbitration or can be
2 ordered by the Commission as he requests. So I'll
3 allow that to stay in the record and to be
4 developed by the proponent, though, as I say, I'm
5 very skeptical that the proponent will be
6 successful.

7 With regard to the motions made by XO,
8 first as to the negotiated matter -- I'm sorry, I'm
9 not saying that very artfully. To the extent that
10 XO wants to strike the matter that was purportedly
11 the subject of or related to party negotiations,
12 I'm going to deny that motion to strike.

13 To the extent that that motion goes to
14 material on Page 5 of Ameritech Exhibit 1, the only
15 portion of this that I think can be fairly
16 addressed by a motion to strike, a motion supported
17 by the argument raised by XO, would be the first
18 sentence of that passage that begins on line 10
19 with the words "I understand."

20 The rest of the subject of that motion
21 to strike, which goes down to line 19, it seems to
22 me is all subsumed by the position that Ameritech

1 has taken consistently both during the initial
2 negotiation period and within the context of this
3 arbitration. And so I feel like all of this would
4 be in the record in any event.

5 As I said, the only exception to that
6 might be the single sentence running from lines 10
7 through 13.

8 So while I'm going to deny the motion to
9 strike, I would prohibit substantive use of that
10 single sentence for establishing any facts
11 pertinent to the arbitration. While I may be
12 missing what creative lawyering can accomplish, I
13 really don't see the importance of that particular
14 sentence anyway, other than XO's desire to sustain
15 the principle that positions taken in negotiations
16 should not be revealed. I'm just not seeing how
17 the revelation of this sentence matters.

18 If the point is that something -- that a
19 position taken during negotiation ought not to be
20 used against one, then I will prohibit its
21 substantive use.

22 As for the matter on Page 6, I think

1 that's all subsumed by -- it's only a single
2 sentence. I think it's clearly subsumed by the
3 position that Ameritech has taken here. It would
4 be in the record in any event, and I don't think
5 it's really tied to anything that XO did solely in
6 the context of negotiation.

7 Based on what I'm saying, I'm not going
8 to strike any of Mr. Kinkoph's testimony, and I'm
9 not striking any of Mr. Panfil's testimony either.
10 So to the extent that you've kind of agreed to
11 mutually strike some of each other's testimony,
12 it's all in.

13 All right. As for the other part of
14 XO's motion, I don't see a legal basis for the
15 motion. I agree with Ameritech that the
16 administrative regulation that was cited does not
17 provide support for the motion.

18 I can see the policy that XO is
19 asserting. I think that's a reasonable policy of
20 presenting what you've characterized as
21 gamesmanship, but I don't think the appropriate
22 remedy for that or the appropriate disincentive for

1 that is to freeze the position of the parties.

2 Also, in the event that the Commission
3 were to adopt Ameritech's overall position in the
4 case, we'd have to fashion a remedy. I mean,
5 there'd have be some actual terms entered into the
6 agreement between the parties. And you would be
7 tying the Commission's hands because it wouldn't be
8 able to recommend approval of any of the terms that
9 Ameritech suggests here.

10 And especially if -- given Section
11 252(c) the Federal Act requires the Commission to
12 see that other requirements of 251 are met and if I
13 believed and the Commission believed that
14 Ameritech's proposal would meet those requirements,
15 the Commission ought not to be foreclosed from
16 using Ameritech's proposal.

17 Well, that's enough. For all those
18 reasons, I'm denying that motion.

19 If anyone wants to take exception to
20 anything I've just done for the record, there's the
21 record.

22 Okay. All right. We have to talk about

1 briefing. Let's go off the record.

2 (Discussion off the record.)

3 JUDGE GILBERT: First briefing schedule, initial
4 brief due September 4th; replies on September 11th.
5 I will attempt to have a proposed order out on the
6 18th or at the latest the 19th, and the single
7 round of exceptions to that proposed order on
8 September 26th.

9 All filings have to be in the office of
10 opposing counsel and filed with the clerk of the
11 Commission by the close of business on the days I
12 just mentioned. Electronic filing is acceptable by
13 all parties and so it can be done at will.

14 For me, if you would send me both a hard
15 copy and an electronic filing on my courtesy copy.

16 In your briefs, in addition to whatever
17 you would say otherwise, I'd like everyone to take
18 a look at numbered paragraph 89 in the FCC order
19 that we've talked about throughout the case, and
20 particularly the penultimate sentence in that
21 paragraph, the one that reads: For those incumbent
22 LECs that choose not to offer to exchange Section

1 252(b)(5) traffic subject to the same rate caps we
2 adopt for ISP-bound traffic, we order them to
3 exchange ISP-bound traffic at the state-approved or
4 state-arbitrated reciprocal compensation rates
5 reflected in their contracts.

6 And please focus on what rates you
7 believe are being addressed there by the FCC and
8 what contracts.

9 Okay. Also in general, I think there's
10 -- a tension has been asserted between Section
11 252(i) and 252(d) among others, so please address
12 that. I'm being very general because I don't want
13 to preclude you from developing any particular
14 arguments.

15 Just as a flavor of what I mean by that,
16 if there is a tension between what is a cost based
17 on just and reasonable rate and the rate that is
18 contained in a contract opted into by a CLEC, how
19 is that tension resolved.

20 And for XO in particular, would you
21 address how your proposal, which I think means how
22 the Focal agreement itself, addresses the various

1 reciprocal compensation elements and mechanisms
2 that are addressed by Ameritech's appendix
3 reciprocal compensation.

4 Again, just to give you a flavor of what
5 I mean there without precluding you from developing
6 the arguments you want to develop, to the extent it
7 appears to me Ameritech is saying that reciprocal
8 compensation is a complicated set of rates and
9 dynamics, is it your position that all of those
10 rates and dynamics are addressed by the Focal
11 agreement and, if so, where.

12 Let me go back to the first thing I
13 asked about, which was numbered paragraph 89 in the
14 FCC order. Since I've given you a flavor of what
15 I'm thinking about with regard to the other two
16 things I wanted you to address, I want to do the
17 same with regard to this paragraph in regard to the
18 particular sentence that I read.

19 When the FCC refers to the
20 state-approved or state-arbitrated reciprocal
21 compensation rates reflected in their contracts,
22 one question that raises for me is whether they're

1 talking about preexisting contracts or the contract
2 being created in this arbitration. And when they
3 refer to rates reflected in their contracts, does
4 that include the tariffed rate for reciprocal
5 compensation.

6 Just to amplify a bit further, since the
7 FCC appears to be saying there that the
8 state-approved or state-arbitrated rates reflected
9 in contracts must be adhered to, does the use of
10 the word "contracts" in the plural create any
11 ambiguity as to what they're talking about.

12 Have I just confused you with the
13 question, or does at least everyone understand the
14 questions? Okay. Feel free to dismiss the
15 importance of these if that's what you want to do
16 in your briefs, but these are the things that occur
17 to me as things I need to know.

18 Okay. Is there anything else? All
19 right. We're heard and taken. Thank you very
20 much.

21 (HEARD AND TAKEN.)

22